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In The

Supreme Court of the United States

ATLAS VAN LINES, INC.,

Petitioners,

v.

RICHARD J. LEWIS AND PATRICIA L. LEWIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Third Circuit err in ruling that the respondents' October 26, 2004 letter to Atlas Van Lines, Inc., an interstate motor carrier, in which respondents failed to assert any dollar amount or estimated dollar amount or range of dollar amounts for their damages, nonetheless satisfied the federal claim-filing requirements of 49 U.S.C. § 14706 and 49 C.F.R. § 370.3(d)(3), and, as a consequence, undermine the intent and purpose of the Carmack Amendment by establishing a new, *third* standard for determining the sufficiency of interstate cargo claims that further defeats and contradicts the goal of uniform and cost-effective claim settlement practices for shippers and carriers throughout the United States?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

The parent company of petitioner Atlas Van Lines, Inc. is Atlas World Group, Inc., which is not a public company. No publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Atlas Van Lines, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 9, 2008, rehearing denied on October 9, 2008, which vacated the May 30, 2007 judgment and opinion of the United States District Court for the Middle District of Pennsylvania, wherein the Court dismissed plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and remanded the case to the District Court for further proceedings and, in support thereof, represents as follows.

OPINIONS BELOW

By Order and Opinion dated May 30, 2007, the United States District Court for the Middle District of Pennsylvania dismissed respondents' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court's ruling is reported at 2007 WL 1576452 (M.D. Pa. May 30, 2007). Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit, and the Precedential Opinion was issued on September 9, 2008. The Precedential Opinion is reported at 542 F.3d 403 (3d Cir. 2008). The District Court ruling and the ruling of the United

States Court of Appeals for the Third Circuit are reproduced in the Appendix hereto, at App. 1 and App. 23, respectively. The judgment of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing is also reproduced in the Appendix hereto. (App. 21).

JURISDICTION

The Order and Precedential Opinion of the United States Court of Appeals for the Third Circuit was entered on September 9, 2008. The Petition for Rehearing and/or Rehearing *En Banc* was denied on October 9, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Carmack Amendment to the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 14706; and,

Part 370.3 of Title 49 of the United States Code, at 49 C.F.R. § 370.3, specifically 49 C.F.R. § 370.3(b)(3).

The pertinent texts of the foregoing statute and regulation are set forth in the Appendix pursuant to Rule 14(f), at App. 40 and App. 46, respectively.

STATEMENT OF THE CASE

Respondents are now residents of Alpine, New York. (App. 50). Petitioner Atlas Van Lines, Inc. ("Atlas") is an interstate motor carrier that transports household goods in interstate commerce, with its principal place of business in Evansville, Indiana. (App. 50).

Respondents entered into a contract to sell their Pennsylvania residence to a non-party purchaser on or before August 27, 2004. (App. 51). The sales contract required respondents to supply a vacant house to the non-party purchasers at the time of closing. (App. 52).

Respondents contracted with Atlas to pack, load and transport their household goods from their old residence in Pennsylvania to their new residence in New York. (See Bill of Lading at App. 52). Pursuant to the Bill of Lading, Atlas, through its disclosed agent, Warner's Moving & Storage,[1] packed, loaded and transported respondents' household goods on, during and between August 23, 2007 and September 3, 2004.

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[1] At all times material hereto, Warner's Moving & Storage was a disclosed household goods agent for defendant/petitioner Atlas Van Lines, Inc. Therefore, pursuant to 49 U.S.C. § 13907, which states that only the motor carrier can be held liable for damages arising from interstate shipment, Atlas Van Lines, Inc. is the sole proper defendant/petitioner in this case. *See, e.g., Taylor v. Mayflower Transit, Inc.*, 161 F. Supp. 2d 651, 658 (W.D.N.C. 2000).

In preparation for the move, Atlas confirmed that respondents' goods would be packed on August 23, 2004 and August 24, 2004 and loaded onto delivery trucks on August 25, 2004 and August 26, 2004. (App. 52). However, for reasons not relevant to the instant analysis, Atlas did not complete the loading process before the August 27, 2004 settlement date on the Pennsylvania residence. Allegedly, as an unforeseen consequence of this slight delay, the sale of the residence did not occur. However, the respondents' goods were ultimately loaded and were delivered on September 3, 2004. The Bill of Lading provided that "as a condition precedent to recovery, a claim for any damage . . . or delay, must be filed within nine months after delivery. . . . (App. 96).

The following month, on October 26, 2004, respondents' attorney sent a letter to Atlas, wherein he advised Atlas that his clients intended to pursue a claim based on Atlas' actions in failure to remove all of the goods from the respondents' Pennsylvania home by August 27, 2004.[2]

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[2] Although not averred in the Complaint, it is believed and therefore averred by petitioner herein that the sale of respondents' Pennsylvania residence had nothing to do with the failure of the Lewises to provide a vacant property on August 27, 2004. Rather, the prospective buyers reneged on the sale contract because they learned prior to the closing date that they would not be able to home school their young children in the Commonwealth of Pennsylvania as they had done at their prior home.

Specifically, the October 26, 2004 letter to Atlas stated:

> As a result of your failure to perform your contractual obligation, Mr. and Mrs. Lewis were unable to meet the terms of the sale of their house, closing of which was scheduled at 4:00 p.m. on August 27, 2004. Since they were not able to close, they lost that sale and have not been able to resell their house.

(App. 123). Further, respondents' attorney stated in his October 26, 2004 letter:

> Mr. and Mrs. Lewis' losses include, but are not limited to, loss of profit on the sale of their residence, additional mortgage payments that Mr. and Mrs. Lewis have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred.

(App. 124). There was no dollar amount included in this letter and neither respondents nor their attorney attached additional information, documentation, receipts or invoices to the October 26, 2004 letter from which Atlas could have ascertained or determined the amount of their alleged damages or even a reasonable approximation thereof. Atlas did not treat the respondents' October 26, 2004 letter as a claim under the regulations applicable to claims for loss, damage or delay made against interstate motor carriers found in 49 C.F.R. § 370.3 as the letter did

not make a "claim for the payment of a specified or determinable amount of money. . . . "

On November 4, 2004, Atlas sent a letter to the Lewises' attorney, wherein it acknowledged the October 26, 2004 letter and requested additional information and documentation. (App. 126). Despite the request for additional information contained in the November 4, 2004 correspondence, neither respondents nor their attorney provided Atlas with additional information regarding the amount of their alleged claims until November 9, 2005, which was well beyond the nine-month claim-filing deadline. (App. 128).

Atlas delivered respondents' household goods on September 3, 2004. Thus, the nine-month deadline for filing a proper claim was June 3, 2005. Respondents signed an Agreement of Sale for their Pennsylvania home to new purchasers on March 14, 2005, which was well within the nine-month claim-filing period. The Agreement of Sale contained the new sale price for the Pennsylvania residence and the date on which the transfer would occur (June 3, 2005). Thus, respondents were able to ascertain the exact amount of their alleged damages on or before March 14, 2005. Moreover, as noted, the closing date for the subsequent sale of respondents' Pennsylvania residence was June 3, 2005. (App. 131). This date also fell within the nine-month claim-filing period. Thus, by June 3, 2005, respondents knew, or should have known, the exact amount of damages allegedly caused by the delayed pick up of their goods. The

information provided to Atlas on November 9, 2005 confirms that the respondents were clearly capable of determining – and indeed did determine – the exact amount of their alleged loss arising from the delayed sale of their Pennsylvania residence during the nine-month claim-filing period. (App. 135).

Atlas rejected the November 9, 2005 letter in accordance with the claim-filing provisions of the subject Bill of Lading, which stated that claims arising from the transportation of respondents' household goods must be filed within nine months of delivery, and in accordance with 49 C.F.R. § 370.3(b), which requires that notice of a claim to a carrier must be filed within the time limits specified in the Bill of Lading.

Respondents subsequently commenced a timely civil lawsuit against petitioner in the Court of Common Pleas for York County, Pennsylvania [Civil Action Number 06-SU-2696-401] on August 23, 2006. (App. 50). Petitioner removed the case to the United States District Court for the Middle District of Pennsylvania. Exclusive federal jurisdiction over this controversy, and petitioner's removal thereof, was based on 28 U.S.C. § 1331 and 28 U.S.C. § 14706 because the claims alleged by respondents against petitioner originate from the transportation of goods in interstate commerce, and Atlas is an interstate carrier for hire, regulated in part under 28 U.S.C. § 14706. (App. 23).

On October 10, 2006, Atlas filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), wherein it

contended that respondents' failure to provide it with a specific or determinable claim for damages as required by 49 C.F.R. § 370.3(b)(3) precluded their lawsuit. On January 30, 2007, United States District Judge John E. Jones, III erroneously[3] concluded that the Carmack Amendment did not apply to the instant case and, as a result, refused to consider whether respondents' notice was timely or sufficient. (App. 23-24). Petitioner filed a Motion for Reconsideration, wherein it contended that the District Court's ruling regarding application of the Carmack Amendment was a clear error of law for which reconsideration was warranted. (App. 24). On May 30, 2007, in response to petitioner's Motion for Reconsideration and the respondents' response thereto (App. 24), Judge Jones issued a Memorandum and Order granting petitioner's Motion for Reconsideration. (App. 23). In addition to ruling that the Carmack Amendment did, indeed, apply to this controversy, Judge Jones determined that respondents failed to provide proper notice of their alleged loss to Atlas and, consequently, dismissed their case. (App. 37).

Respondents filed a timely Appeal of Judge Jones's May 30, 2007 Memorandum and Order on September 24, 2007. Oral argument took place on June 3, 2008 before United States Circuit Judges

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[3] Judge Jones acknowledged that the Court committed a "clear error of law in holding that the Carmack Amendment did not apply to the instant controversy . . . " at Page 10 of his May 30, 2007 Memorandum.

Fisher and Jordan, and United States District Court Judge Yohn, sitting in designation.

On September 9, 2008, a panel of the United States Court of Appeals for the Third Circuit issued a Precedential Opinion, wherein it ruled that respondents' October 26, 2004 letter provided Atlas with sufficient notice of their claim. The panel found that the District Court's ruling to the contrary was in error, vacated the May 30, 2007 Order dismissing respondents' Complaint, and remanded the case to the District Court for further proceedings. Specifically, the panel found that the October 26, 2004 letter satisfied the claim-filing requirements of 49 C.F.R. § 370.3(b)(3) because it provided Atlas with notice of a claim for a "specific or determinable amount of money." (App. 14). The panel differentiated between "specific" and "determinable" as found in 49 C.F.R. § 370.3(b)(3) and found that notice of a claim is "determinable" when it meets the following criteria:

> A claim for a "determinable amount of money" need not explicitly state the dollar amount claimed. Instead, a claim is "determinable" if the amount of money claimed is merely "[cap]able of being determined or ascertained." (App. 14).

The panel further distinguished and defined a "determinable" claim as one that:

> . . . need not include any dollar amount at all. Instead, all that is required is that the claim provide enough information to make it possible to assign a dollar amount to the

claim at some point after the claim itself is filed. (App. 14).

The panel therefore rejected Atlas's argument that a claim "must include some dollar amount" in order to satisfy 49 C.F.R. § 370.3(b)(3). Petitioner filed a timely Petition for Rehearing and/or Rehearing *En Banc*, which was denied on October 9, 2008. This timely Petition follows.

REASON WHY THE WRIT FOR CERTIORARI SHOULD BE GRANTED

I. THE DECISION BELOW CREATS A *THIRD* STANDARD FOR DETERMINING THE SUFFICIENCY OF AN INTERSTATE CARGO CLAIM UNDER 49 C.F.R. § 370.3(b)(3), AND FURTHER CONTRADICTS AND UNDERMINES THE PURPOSE AND INTENT OF CONGRESS IN ENACTING THE CARMACK AMENDMENT AND STANDS IN DIRECT OPPOSITION TO THE RULINGS OF THE UNITED STATES SUPREME COURT WITH RESPECT TO THE PRIMACY AND UNIFORMITY OF THE CARMACK AMENDMENT.

A. Introduction

In ruling that a shipper need not provide the carrier with any dollar amount whatsoever, even an estimate or range of potential damages, in order to satisfy the provisions of 49 C.F.R. § 370(b)(3), the

panel below placed the last straw on the camel's back with respect to undermining the purpose and goal of Congress and the United States Supreme Court in establishing and maintaining a uniform, consistent and predictable regime for the efficient resolution of interstate cargo claims. The ruling below creates serious, wide-ranging and potentially devastating consequences for carriers and shippers alike, as it creates a new, *third* standard for resolving interstate cargo claims that will ultimately prevent the settlement of claims without litigation. The panel has, in effect, made a bad situation worse for shippers and carriers and has presented this Honorable Court with an opportunity to restore order, uniformity and efficiency to this critical area of federal transportation law.

B. Purpose and Goal of the Carmack Amendment

The Carmack Amendment is the key element in the comprehensive scheme to bring uniformity to the area of interstate cargo claim management. Congress enacted the Carmack Amendment to the Interstate Commerce Act in 1906, in response to the chaotic disparity that resulted from the application of varying state laws to interstate shipping.[4] The Carmack

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[4] The ICC Termination Act of 1995 contains separate Carmack Amendment Provisions for rail carriers, motor carriers and freight forwarders. Each of these provisions contains a provision concerning notice of claim and they are all identical.

(Continued on following page)

Amendment defined the parameters of carrier liability for loss and damage to goods transported under interstate bills of lading, bringing uniform treatment to the carrier-shipper relationship. The Amendment, set forth at 49 U.S.C. § 14706, states in relevant part:

> A carrier providing transportation or service . . . shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier . . . is liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property. . . .

Within a few years of the Carmack Amendment's passage, the United States Supreme Court addressed its dual goals of uniformity and preemptive scope. In the seminal case of *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913), the United States Supreme Court discussed Carmack preemption over state law theories of recovery in the broadest terms:

> Almost every detail of the subject [interstate carrier liability] is covered so completely that there can be no rational doubt that Congress intended to take possession of the subject,

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As to rail carriers, motor carriers, and freight forwarders, they remain the same as in the prior versions of the Carmack Amendment. Each states that the carrier may not provide by rule, contract or otherwise a period of less than nine months for filing a claim against it. For purposes of the discussion herein, the Carmack Amendment is discussed as found in the ICC Termination Act of 1995.

> and supersede all state regulation with reference to it.

Id. at 505-506. *Adams Express* held that claims arising out of loss or damage to property transported in interstate commerce are governed by the Carmack Amendment and that all state law claims are preempted. The Court explained the primary objective of the statute is the establishment of a uniform national policy governing liability of interstate carriers.

> This branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a carrier engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to the goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity.

Id. at 505.

Three years later, the United States Supreme Court reaffirmed *Adams Express* in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190 (1916). In *Blish Milling*, the United States Supreme Court ruled that the Carmack Amendment is "comprehensive enough to embrace responsibility for all loss resulting from failure to discharge a carrier's

duty as to any part of the agreed transportation. . . . " 241 U.S. at 196.

Each succeeding Supreme Court ruling interpreting the scope of the Carmack Amendment has repeated the principles enunciated in *Adams Express* and *Blish Milling*, which was the comprehensiveness of application and uniformity of treatment regardless of state laws. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983), quoting *Louisville & Nashville R. Co. v. Rice*, 247 U.S. 201, 203 (1918) ("As to interstate shipments, . . . the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation."); *New York, N.H. & H.R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953); *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915) (holding that preemption applies not only to state law claims which directly contradict the procedures or remedies set forth in the Carmack Amendment, but also encompasses state causes of action which supplement Carmack relief); *Atchinson T. & S.F. Ry. v. Harold*, 241 U.S. 371, 378 (1916).

Indeed, as the following cases clearly establish, it is settled federal law that the remedies provided under the Carmack Amendment preempt all causes of action seeking redress for loss or damage to goods moving through interstate commerce, whether those remedies are predicated on state common law, state statutory law or federal common law. U.S. CONST., Art. VI, cl.2; *Myrick v. Michigan Central R.R.*, 107 U.S. 102 (1882); *Rice v. Santa Fe Elevator Corp.*, 331

U.S. 218 (1947); *Missouri Pacific Ry. Co. v. Elmore & Stahl*, 375 U.S. 811 (1963); *Coughlin v. United Van Lines, LLC*, 362 F. Supp. 2d 1166 (C.D. Cal. 2005); *Smith v. United Parcel Service*, 296 F.3d 1244 (11th Cir. 2002); *Paper Magic Group v. J.B. Hunt Transport*, 318 F.3d 458 (3d Cir. 2003); *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003).

Moreover, all United States Courts of Appeals, including the Third Circuit, which have addressed the issue of Carmack preemption, have unanimously held that the Carmack Amendments' broad scope preempts all state law claims. *See, e.g., Paper Magic Group v. J.B. Hunt Transport*, 318 F.3d 458 (3d Cir. 2003); *see also, Fulton v. Chicago, Rock Island & P.R. Co.*, 481 F.2d 326, 331 (8th Cir. 1973) ("The cases make it clear that when damages are sought against a carrier for failure to properly perform, or for negligent performance of, an interstate contract of carriage, the Carmack Amendment governs."); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987) ("The Carmack Amendment provides the exclusive remedy . . . "); *Cleveland v. Beltman North American Van Lines Co., Inc.*, 30 F.3d 379 (2d Cir. 1994) (Carmack preempted federal common law claim for punitive damages based upon bad faith claims handling.); *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 706-707 (4th Cir. 1993) ("[I]f the Interstate Commerce Commission had jurisdiction over the shipment in this case, Shao's common law claims are preempted by the Carmack Amendment."); *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003); *Moffit v. Bekins Van Lines Co*, 6

F.3d 305, 306-07 (5th Cir. 1993) (Carmack Amendment preempted claims of misrepresentation, fraud, gross negligence, intentional infliction of emotional distress and violation of Texas Deceptive Trade Practices Act.); *W.D. Lawson & Company v. Penn Central Company,* 456 F.2d 419, 421 (6th Cir. 1972) ("As to the . . . issue . . . [of] whether or not the Carmack Amendment preempted common law suits . . . we hold that it did."); *Hughes v. United Van Lines*, 829 F.2d 1407, 1415 (7th Cir. 1987) ("[We] hold that the remedy provision of the Carmack Amendment preempts all state and common law remedies inconsistent with the Interstate Commerce Act . . . "); *Hughes Aircraft v. North American Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992) ("Hughes [the shipper] wisely conceded that federal law preempts any state common law action against . . . a common carrier."); *Underwriters at Lloyds of London v. North American Van Lines*, 890 F.2d 1111, 1120 (10th Cir. 1989) ("[T]he Carmack Amendment preempts state common law remedies against a carrier for negligent damage to goods shipped under a proper bill of lading."); *Smith v. United Parcel Service*, 296 F.3d 1244, 1246-49 (11th Cir. 2002) (Carmack preempted plaintiffs' claim for damages due to the carrier's alleged failure to provide services to plaintiffs.).

As the foregoing cases clearly establish, the primary purpose of the Carmack Amendment is to promote uniformity in the field of federal transportation law, including most importantly the investigation and resolution of cargo damage claims. Foremost

among these goals is the avoidance of unnecessary and costly litigation. It is well-established that the purpose in promulgating regulations for claim-filing was to encourage the parties to settle claims rather than engage in costly and time-consuming litigation. *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980), *cert. denied*, 450 U.S. 915 (1981). Moreover, the regulations were promulgated to encourage the voluntary disposition of loss and damage claims in an amicable manner, privately, between the carrier and the claimant, without the intervention of the courts. *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538 (6th Cir. 1986).

The issue of uniformity cannot be emphasized enough, because it provides carriers *and shippers* with knowledge and expectation that a claim or dispute that arises from the interstate transportation of goods will be considered and, if necessary, litigated, pursuant to a single, uniform standard. Uniformity, if enforced by the circuit courts, promotes expeditious and economical settlements and prevents forum shopping. The need for uniformity is even more pronounced when one considers that 49 U.S.C. § 14706(d)(1) states that an interstate motor carrier may be sued in any state "through which the defendant carrier operates."

As discussed below, the panel's ruling has created a situation where an interstate motor carrier cannot manage, investigate or settle a claim until a lawsuit is filed by the shipper since it will not know the standard by which it must evaluate the sufficiency of

the shipper's notice of claim until *after* the lawsuit is filed and *after* venue is learned. This new reality established by the panel below is completely contrary to Carmack and must be resolved by this Honorable Court.

C. The Panel's Ruling Established a Third Standard to an Already Muddled, Unpredictable and Unworkable Status Quo

The applicable federal regulations governing the filing and processing of claims for loss, damage or delay in the delivery of goods (whether household goods or otherwise) are found at 49 C.F.R. § 370, entitled PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE. The provisions of 49 C.F.R. § 370 are also incorporated into Atlas's tariffs, which are incorporated into the Bill of Lading for the respondents' shipment, attached hereto.

49 C.F.R. § 370.3(a) sets forth the basic requirements for interstate motor carriage claims when it provides that:

> A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier . . . within the specified time limits applicable thereto and as otherwise required by law,

> the terms of the bill of lading or other contract of carriage and all tariff provisions applicable thereto.

49 C.F.R. § 370.3(b)(3) sets forth the following specific requirements for filing a loss, damage or delay claim with a carrier:

> (b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and:
>
> (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property,
>
> (2) Asserting liability for alleged loss, damage, injury or delay, and,
>
> (3) Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however*, That where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

Despite, and expressly contrary to, the clearly stated goals and mandates of Congress and this Honorable Court, the circuit courts of the United

States have left for dead the goal and concept of uniformity in their varied, inconsistent and wholly incompatible interpretations of what constitutes "a specific or determinable amount of money" when examining the sufficiency of notice under 49 C.F.R. § 370.3(b). The situation that existed before the ruling below was untenable, as the circuit courts had created two wholly separate and distinctive standards for determining the sufficiency of a claim. The situation created by the panel's ruling below has added to the confusion, unpredictability and uncertainty by establishing a new, and third, interpretation of the regulation. As discussed below, the ruling below creates a standard where a shipper need not provide any dollar amount, whether in the form of an estimate or range of potential damages, in order to satisfy 49 C.F.R. § 370.3(b)(3). This new standard cannot be reconciled with the previously adopted standards and creates a mish-mash of conflicting standards whose reconciliation is based solely on where the shipper decides to file suit. The rulings of the circuit courts, and in particular the panel below, mock the assertions and mandates of Congress and this Honorable Court in their brazen disregard for uniformity and predictability in the field of federal transportation law. This Honorable Court is presented with the opportunity herein to remedy this untenable situation and restore order where none presently exists.

1. The Pre-*Lewis* Conflict Among the Circuit Courts

As discussed above, the circuit courts have disregarded Congress's desire for uniformity by adopting widely divergent interpretations of 49 C.F.R. § 370.3(b)(3) with respect to whether a shipper must provide a carrier with an exact dollar amount of its claim or, in the alternative, whether a shipper must merely provide the carrier with an estimate or range of potential damages.[5]

Prior to the issuance of the ruling below, the federal circuits were split as to how specific the dollar amount included in a claim had to be to be legally sufficient under 49 C.F.R. § 370.3(b)(3). The Sixth, Seventh, Ninth and Eleventh Circuits have held that "substantial compliance" is sufficient. *See, e.g., Ins. Co. of N. Am. v. G.I. Trucking Co.*, 1 F.3d 903 (9th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994); *Culver v. Boat Transit, Inc.*, 782 F.2d 1467 (9th Cir. 1986); *Kvaerner E&C Metals v. Yellow Freight Sys., Inc.*, 130

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[5] The analysis herein is focused on those situations where the shipper is able to calculate, ascertain or determine its damages during the applicable claim-filing period. The discussion herein does not focus on those situations where the shipper is not able -- after reasonable efforts – to determine its damages during the claim-filing period. These situations, where the requirements of 49 C.F.R. § 370.3(b)(3) cannot be satisfied due to "impossibility," do not apply here, since the respondents knew the exact amount of their damages within the nine-month claim-filing period yet provided Atlas only with the vague references to potential future claims in their October 26, 2004 letter.

Fed.Appx. 172 (9th Cir. 2005); *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364 (9th Cir. 1985) and *Trepel v. Roadway Express, Inc.*, 194 F.3d 708 (6th Cir. 1998). Under the "substantial performance" standard, the shipper need not provide the carrier with an exact dollar amount of its claim. Rather, the shipper need only provide the carrier with an estimate or range of potential values, in dollars, for the damage so that the carrier receives "enough information to begin processing the claim." *Seimens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company*, 420 F.3d 1243 (11th Cir. 2005) (where the Eleventh Circuit adopted the "substantial performance" standard).

Standing in stark contrast to the Sixth, Seventh, Ninth and Eleventh Circuits are the First, Second and Fifth Circuits, which require the shipper to provide an exact dollar amount to the carrier as a condition precedent for recovery. This is the "strict compliance" standard. *See, e.g., Salztein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1190-91 (5th Cir. 1993); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980), *cert. denied*, 450 U.S. 915 (1981); *Nedlloyd Lines B.V. Corp. v. Harris Transport Co.*, 922 F.2d 905 (1st Cir. 1991); and *McLaughlin Transportation Systems, Inc. v. Rubinstein*, 2005 U.S. District LEXIS 19932 (D.Mass. 2005). The circuit courts have acknowledged the split among them, most recently in *Seimens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company*, 2005 U.S. App. LEXIS 17202 (11th Cir. 2005).

Prior to the panel's ruling below, the United States Court of Appeals for the Third Circuit had not squarely adopted the "strict compliance" or "substantial performance" standard. However, it is nonetheless recognized that, in *S&H Hardware Supply Co. v. Yellow Transp., Inc.*, 432 F.3d 550 (3d Cir. 2005), the Court noted its preference for the substantial performance standard in *dicta*. *Id.*, at 554 (*see, Sorkin, Goods in Transit – Selected Regulations, Statutes and Treaties*, Vol. 2, § 7.09[3], p. 7-59.) Nevertheless, when given the opportunity to do so in the case herein, the Third Circuit did not embrace or adopt either the strict compliance or substantial performance standard. Rather, the Third Circuit created a third standard to further muddle an already unpredictable field of law.

2. The Ruling Below Creates a Third Standard

As the foregoing cases clearly demonstrate, the circuit courts have strayed well off of the reservation in their efforts to maintain uniformity in the field of interstate cargo claim management with their divergent interpretations of 49 C.F.R. § 370.3(b). The Third Circuit, however, went well beyond the already abandoned reservation and struck out for even more remote territory in its unique and heretofore unstated interpretation of the regulations. As demonstrated below, the panel ruled that no amount of money need be claimed by a shipper when making a claim to the carrier:

> The plain meanings of "specified" and "determinable" reveal a key difference between them and hence between the kinds of claims permitted by the regulation. A claim for a "specified amount of money" is a claim that explicitly gives the dollar amount of money being claimed. However, a claim for a "determinable amount of money" need not explicitly state the dollar amount claimed. Instead, a claim is "determinable" if the amount of money claimed is merely "[cap]able of being determined or ascertained." Notably, because a claim for a "specific amount of money" must state the amount explicitly, such claims must be reduced to an exact dollar amount at the time the claim is made. **By contrast, a claim that is "determinable" need not include any dollar amount at all. Instead, all that is required is that the claim provide enough information to make it possible to assign a dollar amount to the claim at some point after the claim itself is filed.** (App. 14).
>
> Were we to accept Atlas's invitation to require that every claim must provide some dollar amount to comply with subsection (b)(3), we would be treating the term "determinable" as merely redundant of the term "specified," and would be ignoring the use of the word "or" between the two terms.

(App. 14-15). (emphasis added).

Despite its statements to the contrary, it is nonetheless apparent that – as a result of the panel's ruling below – a claim to a carrier in the Third Circuit *need not contain any dollar amount whatsoever*; mere categories of loss or damage are sufficient. Thus, regardless of how the panel below sought to distinguish its ruling as separate and distinct from the "strict compliance" versus "substantial performance" analysis, it is nonetheless obvious – from a legal and practical perspective – that the panel did, in fact, make new law and create a new, heretofore unstated and previously rejected, third standard for notice. The panel's interpretation of 49 C.F.R. § 370.3(b) has effectively rendered the requirement that a shipper provide a written communication making claim for the payment **of an amount of money**, whether it be specified or determinable, superfluous and without effect. A shipper may now provide only some vaguely "determinable" basis for a future dollar amount rather than diligently work to provide an actual claim for the payment of an amount of money to which a carrier can respond by either paying the claim or denying the claim. In addition, under the panel's reasoning, the "or" in 49 C.F.R. § 370.3(b)(3) effectively eviscerated and made irrelevant the term "specified." If the panel's reasoning is applied to a claim, the shipper may completely ignore the requirement for a specified amount of money in its claim, so long as it provides the carrier with some information about the types of losses being claimed the value of which are "capable of being determined or ascertained . . . at some point after the claim itself is filed." (App. 14).

Indeed, the Eleventh Circuit identified and recognized this heretofore rejected third standard when it acknowledged the failure of those claims "in which the shipper provided the carrier with no damage amount at all." *Seimens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company*, 420 F.3d 1243 (11th Cir. 2005), citing *Salztein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1190-91 (5th Cir. 1993) and *Nedlloyd Lines B.V. Corp. v. Harris Transport Co.*, 922 F.2d 905 (1st Cir. 1991).

Nonetheless, in the ruling below, the panel chose to ignore the well-established rule that – as stated clearly in *Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company*, – shippers who provide "no damage amount at all" when making a claim for damages are precluded from recovery. 420 F.3d at 1249, citing *Salztein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1190-91 (5th Cir. 1993); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980), *cert. denied*, 450 U.S. 915 (1981); and *Nedlloyd Lines B.V. Corp. v. Harris Transport Co.*, 922 F.2d 905 (1st Cir. 1991).

Respondents herein did not provide Atlas with any dollar amount whatsoever, either in their October 26, 2004 letter or at any time during the nine-month claim-filing period (even though they learned of their exact claim amount well within the nine-month period). It is absolutely clear that such non-performance would have precluded respondents' recovery in the First, Second and Fifth Circuits,

which, as noted, require the shipper to provide the carrier with an exact dollar amount within the claim-filing period. It is equally certain that respondents' claim would have failed in the Sixth, Seventh, Ninth and Eleventh Circuits, since they failed to provide even an estimate or range of potential dollar damages to petitioner during the claim-filing period. Despite the panel's reasoning to the contrary, there was *no standard* satisfied by the respondents in their October 26, 2004 letter or at any time in the claim-filing period. Indeed, the *only standard* by which respondents' claim could proceed was under a *new* standard, adopted in the case herein, which allowed respondents' to file suit even though they did not provide Atlas with *any dollar amount* whatsoever. This standard can be described as the "no compliance" or "no performance" standard, and it stands in stark contrast to the previously existing standards of "strict compliance" and "substantial performance."

3. The Effect of the Panel's Ruling is Broad, Severe and Will Undermine the Purpose and Goal of the Carmack Amendment

As discussed, the Carmack Amendment was enacted in 1906 to promulgate and ensure the efficient transportation of goods in interstate commerce, and to create a national policy regarding an interstate carrier's liability for damages arising from the interstate transportation of goods. *New York, New Haven & Hartford Railroad Co. v. Nothnagle,* 346

U.S. 128, 131, 73 S.Ct. 986 (1953). Thus, while the principal purpose of the Carmack Amendment is to achieve national uniformity in assigning liability to carriers *Rini v. United Van Lines, Inc.*, 104 F.3d 502, *cert. denied*, 118 S.Ct. 51, 522 U.S. 809, 139 L.Ed.2d 16, its more important practical and commercial effect is to "secure reasonable notice" to the carrier to promote the timely and cost-effective resolution of damage claims. *See, Seimens Power Transmission & Distribution, Inc. v. Norfolk Southern Railway Company*, 420 F.3d 1243 (11th Cir. 2005). Indeed, 49 C.F.R. § 370.3(b)(3), initially promulgated as 49 C.F.R. § 1005.2, was enacted in 1972 by the Interstate Commerce Commission to "combat carriers' attempts to discriminate among shippers in their payment of claims, **to encourage prompt investigation and voluntary settlement, and to facilitate more 'harmonious relationships' between carriers and claimants.**" *See, Ex Parte No. 263: Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515, 547-548, 553 (1972) (emphasis added).

By establishing a national, uniform regime for the resolution of interstate cargo claims, the Carmack Amendment enables carriers to assess their risks and exposures and to predict their potential liability for damages, regardless of where the loss, injury or delay occurs. *Suarez v. United Van Lines, Inc.*, 791 F. Supp. 815 (D.Colo. 1992). This "national scheme of carrier liability" promotes and effectuates the predictable

and efficient flow of goods by providing carriers with well-defined parameters within which they can evaluate claims, manage risk and predict future exposure.

The foregoing differences with respect to the judicial interpretation of 49 C.F.R. § 370.3(b)(3) contravene and undermine the purpose of Carmack, since an interstate motor carrier cannot, under the panel's reasoning, reliably ascertain, predict or manage its risk or exposure to loss if it has to factor the location of the loss into its evaluation. Rather, just as the drafters of Carmack sought to avoid, the value of a claim will, and does, depend upon where the particular lawsuit is filed.

Moreover, the conflicting interpretations of 49 C.F.R. § 370.3(b)(3) put carriers in an impossible "Catch-22" situation: under 49 C.F.R. § 370.3(a), a carrier cannot voluntarily pay a claim unless it meets the requirements of § 370.3(b), but the carrier does not now know if a claim meets the requirements of § 370.3(b) until it is sued. This will effectively preclude a carrier from attempting to settle a claim until a lawsuit is filed. In the instant case, for example, respondents moved from Pennsylvania to New York. Pursuant to 49 U.S.C. § 14706(d)(1), respondents could have filed suit against Atlas in New York or Pennsylvania (or, for that matter, in any of the other judicial districts in the United States as Atlas, like many carriers, operates in all of them). Had respondents filed their lawsuit in New York, their October 26, 2004 letter would have certainly and undeniably

failed to satisfy the requirements of 49 C.F.R. § 370.3(b)(3). As noted, New York, as part of the Second Circuit, is a "strict compliance" jurisdiction, which requires that the shipper provide the carrier with an exact dollar amount of a claim as a condition of recovery. Since respondents filed their lawsuit in Pennsylvania, the controversy was controlled by the law of the Third Circuit, which, as a result of the ruling below, requires nothing more from the shipper but a vague description of a right to a future recovery. In an even more remarkable scenario, had Atlas moved the respondents from Ohio (a Sixth Circuit "substantial performance" jurisdiction) through Pennsylvania to New York, any one of three standards for proper notice under 49 C.F.R. § 370.3(b)(3) [strict compliance, substantial performance or the "no-performance" standard adopted by the panel below], could have applied.

The clearly stated and undeniable purpose of the federal claim-filing regulations is, as noted, to promote the fair and efficient resolution of claims and, equally important, to avoid the costs and delays of litigation. However, under the present reality, the only way that Atlas, or any other motor carrier, can determine whether notice from a shipper complies with 49 C.F.R. § 370.3(b)(3) is to wait until after a lawsuit if filed so that venue and jurisdiction are revealed. The sheer impracticality and overwhelming absurdity of the present situation mandates review by this Honorable Court.

It is also important to note that, although the case *sub judice* involves unsophisticated shippers of household goods, the effect and consequences of the ruling are not so limited. Every day, goods worth billions of dollars are transported by thousands of carriers, large and small, for commercial shippers and household goods shippers. The conflicting standards among the circuit courts present sophisticated shippers with the opportunity to forum shop when bringing suit against a carrier, particularly since a delivering carrier is subject to suit under Carmack in any federal district in which it operates. The inherent unfairness of this situation is obvious, since it places carriers at an unfair disadvantage when attempting to resolve claims. Moreover, the costs to society and the economy as a whole are, and will continue to be, enormous, as carriers will avoid efforts to resolve claims until venue is established and shippers will forum shop and proceed directly to litigation in order to secure the best opportunity for recovery.

4. The Ruling Below Presents an Opportunity to Re-Assert the Uniformity and Primacy of Carmack and of this Honorable Court

In setting forth the reasons this Honorable Court will consider in determining whether to grant certiorari, United States Supreme Court Rule 10(a) states foremost that certiorari will be granted when a decision of a court of appeals of the United States "is in conflict with the decision of another United States

court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also, Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). The ruling below certainly concerns a matter of significant national importance, as it muddies an already murky sea of conflicting standards as to what constitutes a sufficient claim under a federal regulation drafted primarily to ensure national uniformity and efficient, fair claim settlement processes.

Thus, the panel's ruling below presents this Honorable Court with the opportunity to address the inherent illogicality and commercially impractical consequences of the aforementioned split among the circuit courts.

CONCLUSION

The primary purpose of the Carmack Amendment and the Code of Federal Regulations Part 370 is to promote, protect and promulgate the uniform management, administration and resolution of loss, damage and delay claims arising from the interstate transportation of goods, including household goods. The circuit courts have interpreted 49 C.F.R. § 370.3(b)(3) to require either an exact dollar amount from the shipper [strict compliance] or a range or estimate of damages [substantial performance] to the carrier in order to constitute a sufficient claim. In redefining the meaning of the term "determinable" in

49 C.F.R. § 370.3(b)(3), the panel established and adopted a third and heretofore unrecognized standard that eliminates altogether the shipper's obligation and duty to provide the carrier with some dollar amount, whether an estimate, range of values or exact figure, within the claim-filing period. The panel's interpretation of 49 C.F.R. § 370.3(b)(3) was so expansive and novel that it established a new, third standard, wherein a shipper need not provide any dollar amount whatsoever to the carrier at any time during the nine-month claim-filing period. This new standard stands in sharp contrast to the two previously existing standards of interpreting 49 C.F.R. § 370(b)(3) and has made an already muddled legal environment even worse by adding even more uncertainty and delay into the claim-filing and settlement process.

For the foregoing reasons, petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the decision of the Court below and to review the conflict that has developed with this Court's holdings, as well as the holdings of other circuits, regarding the shipper's duties pursuant to

49 C.F.R. § 370.3(b)(3) to file a timely and sufficient claim to the carrier.

Respectfully submitted,

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Dated: January 7, 2009

PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2688

RICHARD J. LEWIS;
PATRICIA A. LEWIS

Appellants,

v.

ATLAS VAN LINES, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 06-cv-1862)
District Judge: Honorable John E. Jones, III

Argued June 3, 2008

Before: FISHER, JORDAN, *Circuit Judges* and YOHN*, *District Judge.*

(Filed: September 9, 2008)

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* Honorable William H. Yohn, Jr., Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION

JORDAN, *Circuit Judge*.

This appeal involves a claim by Richard and Patricia Lewis against Atlas Van Lines, Inc. ("Atlas") for damages incurred as a result of Atlas's failure to live up to its promise to move the Lewises' household belongings by a date certain. The District Court dismissed the Lewises' claim, concluding that they had failed to comply with the procedural requirements of 49 U.S.C. § 14706, also known as the "Carmack Amendment," or, for purposes of this opinion, the "Amendment." While we agree with the District Court as to one aspect of its ruling, as more fully explained herein, we disagree that the Lewises' claim for damages in the amount of additional mortgage payments they had to make and the lost profit on the sale of their home was insufficient to comply with the Carmack Amendment and applicable regulations. We

will therefore vacate the District Court's order dismissing the case and remand for further proceedings.

I. Standard of Review & Jurisdiction

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. The standard of review for a dismissal under Federal Rule of Civil Procedure 12(b)(6) is *de novo. Phillips v. County of Allegheny,* 515 F.3d 224, 231 (3d Cir. 2008). In conducting our review, we must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Id.* at 233.

II. Background

Consistent with our standard of review, we recite the facts of the case in the light most favorable to the Lewises. The Lewises owned and lived in a house in Glen Rock, Pennsylvania. On July 19, 2004, as part of a planned move to New York, they entered into a contract to sell that residence. The sales agreement provided that the Lewises would deliver "a vacant building" to the buyer at the time of the closing, which was scheduled for August 27, 2004. (Appellee App. at A24 ¶¶ 6-8.) Well aware of the need to move their belongings quickly to comply with the terms of the sales agreement, the Lewises solicited a bid from Atlas's local agent, Warners Moving and Storage

("Warners"), explicitly informing Warners that their house had to be empty before August 27. The Lewises also informed Warners that they had purchased a new home in New York and that they intended to use the proceeds from the sale of their Pennsylvania home to pay for it.

Warners assured the Lewises that, if hired, it would have their Pennsylvania residence emptied by August 26, the day before the closing was scheduled to occur. On July 27, 2004, a Warners sales representative executed an agreement with the Lewises providing that "Warners Moving and Storage will arrive at your home on 8/23 & 8/24 to box the household belongings with loading the household effects on 8/25 & 8/26. Delivery is scheduled for 8/31 or 9/1." (Appellee App. at A42.)

However, notwithstanding its explicit promise, made with full awareness of the Lewises' obligation to present an empty home at closing on August 27 and their need to pay for their new home in New York, Warners dramatically failed to fulfill its commitment. On August 23 and 24, Warners did pack the Lewises' belongings as required, and on August 25, Warners did provide a moving van at the Lewises' residence, and began loading the belongings into the van. Despite its obligation to complete the loading by the following day, though, and knowing full well the possible consequences to the Lewises, Warners advised the Lewises that the moving van was leaving that evening because the tractor and crew were

needed to handle a move to North Carolina for another customer the next day.

The Lewises were still left believing that another crew would appear with a tractor trailer to finish their move as scheduled. But, on August 26, the day it had agreed to complete the loading, Warners failed to show up at the Lewises' home. Obviously concerned, the Lewises attempted to contact Warners. No one from Warners appeared at the Lewises' home that day, and no one from Warners offered any explanation for the delay. Nor did Warners appear on August 27, the day of the closing. Aware that the real estate transaction was in serious jeopardy, the Lewises again tried to contact Warners and eventually spoke to Jeff Warner at around noon on August 27.[1] Mr. Warner advised the Lewises that there were no licensed drivers available to deliver a moving van to their residence.

Later that day, the Lewises attended the scheduled closing. Not surprisingly, given Warners' failure to perform as promised, the Lewises were unable to deliver a vacant home to the purchasers. The purchasers refused to go through with the sale. Warners did not complete the loading of the Lewises' belongings until August 29, and did not deliver them to New York until September 3, 2004.

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[1] We are unable to tell from the record whether Jeff Warner was a principal of Warners or simply an employee.

When the Lewises' belongings arrived at their new home in New York, Richard Lewis acknowledged their receipt by signing a Household Goods Bill of Lading and Freight Bill. That document provided that "as a condition precedent to recovery, a claim for any damage . . . or delay, must be filed within nine months after delivery. . . . When a claim is not filed . . . in accordance with the foregoing provisions, carrier shall not be liable and such a claim shall not be paid." (Appellee App. at A139.)

The following month, on October 26, 2004, the Lewises' attorney sent a letter to Warners requesting compensation for losses incurred because of Warners' failure to timely perform as promised under the parties' agreement. The letter requested damages equal to the "loss of profit on the sale of their residence, additional mortgage payments that Mr. and Mrs. Lewis have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred." (Appellee App. at A150.) The letter went on to explain that the Lewises could not provide an exact dollar amount for their losses "until they are able to sell their Pennsylvania residence." (Appellee App. at A151.) Shortly thereafter, on November 4, 2004, Warners' counsel sent a letter to the Lewises' attorney acknowledging receipt of the October 26, 2004 letter, and requesting additional information and documentation.

On March 14, 2005, the Lewises entered into a new contract to sell their Pennsylvania property. The sale closed on June 3, 2005, at a price approximately $35,000 lower than the amount the Lewises would have received under the prior sales agreement, had that transaction been completed. During the nine-month period between the delivery of their belongings to New York and the sale of their Pennsylvania residence, the Lewises paid approximately $9,000 in mortgage payments on the Pennsylvania residence, approximately $1,600 in additional utility bills, and over $28,000 in additional taxes.[2]

On November 9, 2005, the Lewises sent a letter to Warners fully explaining their damages and providing a detailed spreadsheet showing the expenses incurred because of Warners' failure to keep its promises. Warners refused to pay, and the Lewises were compelled to file suit.

In their complaint filed on August 23, 2006 against Atlas in its capacity as Warners' principal, the Lewises asserted claims for breach of contract and negligence and sought approximately $72,000 in

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[2] While $28,000 may seem an extraordinary tax liability under these circumstances, the Lewis's explained in a November 9, 2005 letter to Atlas that approximately $20,000 of that figure represented federal income taxes that they were required to pay as a penalty for withdrawing money from a 401(k) account. They assert that they withdrew the money so that they could purchase their home in New York, a step they would not have had to take if they had been able to sell their Pennsylvania home as planned.

damages. Atlas, relying on the Carmack Amendment, removed the case to the United States District Court for the Middle District of Pennsylvania. Atlas then filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). It argued that the Lewises' state law claims were preempted by the Amendment and that the Lewises could not obtain relief under that statute because they had not complied with an associated regulation, 49 C.F.R. § 370.3, which requires a shipper to file a claim "for a specified or determinable amount of money" with the carrier within the time limits specified in the bill of lading.

On January 30, 2007, the District Court denied Atlas's motion to dismiss, concluding that the Carmack Amendment did not preempt the Lewises' state law claims. However, on May 30, 2007, the District Court granted Atlas's motion for reconsideration and dismissed the case. In doing so, the District Court agreed with Atlas that the Lewises' state law claims were preempted and that the Lewises had not complied with the cited regulation. This appeal followed.

II. Discussion

Subsection (a)(1) of the Carmack Amendment, 49 U.S.C. § 14706(a)(1), provides in relevant part that:

> A carrier providing transportation or service . . . shall issue a receipt or bill of lading for property it receives for transportation. . . . That carrier . . . [is] liable to the person entitled to recover under the receipt or bill of

> lading. The liability imposed under this paragraph is for the actual loss or injury to the property. . . .

At oral argument, counsel for the Lewises correctly conceded that the Amendment preempts the Lewises' state law claims against Atlas.[3] *See, e.g., Ga., Fla. & Atlantic Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 196 (1916) (explaining that the Carmack Amendment covers "all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation"); *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305, 306 (5th Cir. 1993) (holding that the Carmack Amendment preempted state law claims by a consumer shipper against a moving company based on late delivery of the shipper's belongings).

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[3] Although the Lewises concede that the Carmack Amendment governs their claims, they urge us to exempt them entirely from complying with the claim filing requirements set out in 49 C.F.R. § 370.3. Relying on *Wisconsin Packing Co. v. Indiana Refrigerator Lines, Inc.*, 618 F.2d 441 (7th Cir. 1980), the Lewises contend that § 370.3 does not apply to them because Atlas has chosen to contest their claim. Were we writing on a clean slate, the Lewises' argument might have greater force because, as the Seventh Circuit pointed out in *Wisconsin Packing*, § 370.3 explicitly refers only to claims paid "voluntarily" by a carrier. *Id.* at 445. However, the Lewises' reading of the regulation is foreclosed by our recent decision in *S & H Hardware & Supply Co. v. Yellow Transp., Inc.*, 432 F.3d 550, 556 (3d Cir. 2005) (explaining that "[a]s a matter of public policy, the [regulation] is intended to provide carriers with an opportunity to investigate claims, so it reaches its full usefulness precisely when a carrier wishes to contest a claim").

As to claims under the Carmack Amendment itself, subsection (e)(1) provides that "a carrier may not provide . . . a period of less than 9 months for filing a claim against it under this section. . . ." 49 U.S.C. § 14706(e)(1). The contents of a valid claim are set forth in 49 C.F.R. § 370.3.[4] Pursuant to subsection (b) of that regulation, a claim for "loss, damage, or delay to cargo" must include:

> A written or electronic communication . . . from a claimant, filed with a proper carrier within the time limits specified in the bill of lading . . . and:
>
> > (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property,
> >
> > (2) Asserting liability for alleged loss, damage, injury, or delay, and

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[4] The regulations found in 49 C.F.R. § 370.3 went into effect in 1997 and are also found in 49 C.F.R. § 1005.2. As a result, several of the cases we discuss in this opinion cite to 49 C.F.R. § 1005.2 rather than 49 C.F.R. § 370.3. However, the two provisions are identical. *See* Motor Carrier Routing Regulations; Disposition of Loss and Damage Claims and Processing Salvage; Preservation of Records, 62 Fed.Reg. 32040-01 (June 12, 1997) (explaining that, due to the passage of the Interstate Commerce Commission Termination Act of 1995, it was necessary to "add[ ] to 49 CFR chapter III certain motor carrier transportation regulations, also codified in 49 CFR chapter X.") For clarity's sake, we will refer to the regulation as 49 C.F.R. § 370.3 throughout this opinion.

> (3) Making claim for the payment of a specified or determinable amount of money,
>
> shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading. . . .

Consistent with subsection (e)(1) of the Amendment, the bill of lading that Atlas gave to the Lewises required that, "as a condition precedent to recovery, a claim for any damage . . . or delay, must be filed within nine months after delivery. . . . When a claim is not filed . . . in accordance with the foregoing provisions, carrier shall not be liable and such a claim shall not be paid."[5] (Appellee App. at A139.) Atlas delivered the Lewises' belongings to their new home in New York on September 3, 2004. Thus, pursuant to the bill of lading and the Amendment, the Lewises had until June 3, 2005 to provide Atlas with notice of their claim in a manner that complied with 49 C.F.R. § 370.3(b).

On appeal, the parties do not dispute that the October 26, 2004 letter sent by the Lewises' attorney to Atlas satisfies the requirements found in § 370.3(b)(1) and (b)(2). They disagree, however, on

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[5] We note that the bill of lading does not appear to contain any reference to the regulation or any requirement that the claim be for a specified or determinable amount of money. We do not imply that such a reference is legally required, but its inclusion may have assisted in the resolution of this dispute before litigation.

whether that letter makes a claim for a "specified or determinable amount of money," as required by § 370.3(b)(3). The Lewises argue that the letter makes a claim for a determinable amount of money because it identifies their losses as the "loss of profit on the sale of their residence, additional mortgage payments that [they] have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred." (Appellee App. at A150.) According to the Lewises, listing the nature of their damages renders their claim "determinable" because those damages are "susceptible of being determined, found out, definitively decided upon, or settled." (Appellant Br. at 17.) Atlas responds that, to make a claim for a determinable amount of money, the Lewises' claim must include, at minimum, some dollar amount, and the October 26 letter fails to provide "any dollar amount whatsoever." (Appellee Br. at 9, 26.) We agree with the Lewises that the October 26, 2004 letter stated a claim for a determinable amount of money as to the amount of their extra mortgage payments and the difference between the price at which they would have sold their Pennsylvania home, but for Warners' actions, and the lower price at which the home ultimately sold. However, a claim for "miscellaneous" expenses is too vague to constitute a claim for a determinable amount of money, as contemplated by the regulation, and hence Atlas is not liable for those expenses.

We begin our analysis of § 370.3 with the rule that "[t]he basic tenets of statutory construction apply to construction of regulations and 'our starting point on any question concerning the application of a regulation is its particular written text.'" *Pa. Fed'n. of Sportsmen's Clubs, Inc. v. Kempthorne,* 497 F.3d 337, 351 (3d Cir. 2007) (quoting *Wilson v. U.S. Parole Comm'n,* 193 F.3d 195, 197 (3d Cir. 1999)). In examining a regulation's text, "[i]t is a fundamental canon of . . . construction . . . that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *CSX Transp. Co. v. Novolog Bucks County,* 502 F.3d 247, 257 (3d Cir. 2007) (citations and internal quotation marks omitted).

As noted already, § 370.3(b)(3) requires that a valid claim include a "written communication . . . [m]aking [a] claim for the payment of a *specified or determinable* amount of money." 49 C.F.R. § 370.3(b)(3) (emphasis added). Because the regulation does not define the meaning of the term "specified" or the term "determinable," we must apply the ordinary meaning of those words. "Determinable" simply means "[a]ble to be determined or ascertained." *Black's Law Dictionary* (8th ed. 2004). "Specify," by contrast, means "to mention or name in a specific or explicit manner: tell or state explicitly or in detail." *Webster's Third New International Dictionary,* 2187 (Philip Babcock Gove, ed. 1961) (1986). The plain meanings of "specified" and "determinable" reveal a key difference between them and hence

between the kinds of claims permitted by the regulation. A claim for a "specified amount of money" is a claim that explicitly gives the dollar amount of money being claimed. However, a claim for a "determinable amount of money" need not explicitly state the dollar amount claimed. Instead, a claim is "determinable" if the amount of money claimed is merely "[cap]able of being determined or ascertained." Notably, because a claim for a "specific amount of money" must state the amount explicitly, such claims must be reduced to an exact dollar amount at the time the claim is made. By contrast, a claim that is "determinable" need not include any dollar amount at all. Instead, all that is required is that the claim provide enough information to make it possible to assign a dollar amount to the claim at some point after the claim itself is filed.

Our conclusion that "specified" claims under § 370.3(b)(3) include exact dollar amounts while "determinable" claims do not is not only consistent with the ordinary usage of both terms, it is also consistent with another canon of statutory and regulatory construction. We have explained that "[i]f possible, we must give effect to every clause and word of a statute, and be reluctant to treat statutory terms as surplusage." *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004) (citations and internal punctuation and quotation marks omitted). Were we to accept Atlas's invitation to require that every claim must provide some dollar amount to comply with subsection (b)(3), we would be treating the term "determinable" as merely redundant of the term

"specified," and would be ignoring the use of the word "or" between the two terms.[6]

Atlas attempts to evade the ordinary meaning of the regulation's language and the basic rules of textual construction by arguing that, while a "determinable" claim need not include the exact amount of the shipper's claim, it must include some dollar amount. We find no support for Atlas's reading, either in the text of the statute itself or in common sense. Requiring a shipper to list some dollar amount presents the shipper with some limited options. The shipper might list a single dollar amount, such as "$100.00." As we have already explained, such a claim is a claim for a "specified" amount of money, not a "determinable" amount of money. Second, a shipper might list an estimate of its damages, for example, by filing a claim for "$100 more or less." Without further amplification, such a claim is not for a specified or determinable amount of money because 49 C.F.R. § 370.3(d) provides that:

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[6] Rather than focus on the regulation's text, the Lewises urge us to adopt a "substantial performance" standard to evaluating claims under § 370.3(b). We have previously noted the possibility of such a standard in dicta. *See S & H Hardware*, 432 F.3d at 554 (stating that "[c]ourts have construed the written claim requirement liberally, however, and the standard for determining sufficiency is one of substantial performance") (internal quotation marks and citations omitted). In this case, we may resolve the Lewises' appeal based on the plain meaning of § 370.3(b)(3). Thus, while we do not reject the application of a substantial performance standard in an appropriate case, we have no reason to consider it here.

> [w]henever a claim is presented . . . for an uncertain amount, such as '$100 more or less,' [the carrier] shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay [such] a claim unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

The implication of the clause "until a formal claim in writing for a specified or determinable amount of money shall have been filed" is that a claim like "$100 more or less" is different from and does not meet the "specified or determinable" standard.

However, we do not read § 370.3(d) to bar all claims that are less than fully specific regarding the dollar amount at stake. Instead, the plain meaning of the word "determinable" leads us to conclude that § 370.3(d) bars claims that include estimated dollar amounts only when the claim does not contain sufficient information to put the carrier on notice of the nature and extent of its liability. *Cf. Trepel v. Roadway Exp., Inc.*, 194 F.3d 708, 712 (6th Cir. 1999) (holding § 370.3(b)(3) was satisfied when the nature of the shipper's damages was not in dispute and the shipper estimated those damages at $150,000); *Ins. Co. of N. Am. v. G.I. Trucking Co.*, 1 F.3d 903, 904-05 (9th Cir. 1993) (applying a "substantial performance" standard to § 370.3(b) and holding that a claim satisfied § 370.3(b)(3) when the shipper identified the

shipment at issue, provided supporting documentation, and estimated his damages at $100,000).

Beyond the unwarranted twist Atlas's argument gives to the plain meaning of "determinable," t' argument also violates an important purpose of the statute. "The purpose of the written claim requirement is to insure that the carrier may promptly investigate claims, and not to permit the carrier to escape liability." *S & H Hardware & Supply Co. v. Yellow Transp. Inc.*, 432 F.3d 550, 554 (3d Cir. 2005). The "crux of the notice [under § 370.3(b)] is whether it apprises the carrier of the basis for the claim and that reimbursement will be sought." *Id.* Valid claims are determinable not because they include some dollar amount, but because they provide enough information about the nature and extent of the carrier's liability to allow the carrier to understand its potential exposure to liability. *See G.I. Trucking Co.*, 1 F.3d at 906 (explaining that "the form of the written notice is less important than its adequacy in apprising the carrier of the basis for the claim and the fact that reimbursement will be sought."). Thus, although a valid claim will often include an estimate of the shipper's damages along with enough factual information to inform the carrier of the basis for the claim, a dollar amount is not an absolute requirement. *See id.*(stating that "[o]ther circuits . . . have held that a claim must specify an amount of damages to be considered legally sufficient under the regulations. . . . We expressly reject this conclusion.") (citations omitted).

We conclude that, as to part of what they demanded, the Lewises' October 26, 2004 letter provides a sound example of how a shipper may give proper notice to a carrier of a determinable claim without including a dollar amount. The letter informed Atlas that it was being asked to pay for the loss of profit on the sale of their residence and for additional mortgage payments that Mr. and Mrs. Lewis would have to pay on their Pennsylvania residence which otherwise would have been paid off at closing. (Appellee App. at A150.) The letter went on to explain that the Lewises could not provide an exact dollar amount for their losses "until they are able to sell their Pennsylvania residence." (Appellee App. at A151.) Based on the information provided to it by the Lewises, Atlas knew the nature of that claim, and how the amount of it would ultimately be determined.[7] Section 370.3(b) requires nothing more.

However, the Lewises' additional demand that they be reimbursed for "miscellaneous expenses" requires different treatment. Unlike their claim for lost profit and payment of additional mortgage

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[7] Atlas also alleges that the Lewises failed to act in a timely manner because they did not provide it with the final dollar amount of their damages until November 2005, well after the nine-month claim filing period specified in the bill of lading had expired. Atlas's argument misses the mark because, for the reasons we have explained, the Lewises' October 26, 2004 letter, which was undisputedly sent within the nine-month period, included a valid claim for a "determinable amount of money" under § 370.3(b)(3).

liability, that claim is not determinable because it does not inform Atlas of the nature of the claim or the extent of Atlas's liability. Hence, with respect to that claim, the Lewises did not file a "determinable" claim within the nine months specified by the bill of lading, and Atlas is not liable to them for whatever those expenses may be.[8]

Finally, Atlas urges us to follow other Circuits which, it insists, have held that claims which completely lack dollar amounts cannot satisfy § 370.3(b)(3). We decline the invitation. As already explained, our analysis of the text of the regulation persuades us that a dollar amount is not required.[9]

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[8] It was, for example, only after the nine-month time frame that the Lewises described the tax penalty they faced by being forced to withdraw funds from their 401(k) account.

[9] We note, however, that Atlas overstates the holdings of at least two of the cases on which it relies. In *Pathway Bellows Inc. v. Blanchette*, 630 F.2d 900 (2d Cir. 1980), the Second Circuit did not explicitly hold that a dollar amount was required. Instead it held that the shipper's claim was "inadequate in form" when the relevant portion of the shipper's claim stated in its entirety that "the purpose of this letter is to state, in writing, that we are in the process of filing a claim for freight damage." *Id.* at 901, 904. As we have explained, it is not the lack of a dollar amount that dooms such claims, rather such claims are inadequate because they do not provide a carrier with any information about the nature of the damage incurred, or the extent of the carrier's liability. In addition, such claims are potentially open-ended in the sense that they do not indicate to the carrier when, or how, the shipper's claim will be reduced to a dollar amount. In *Siemens Power Transmission & Distribution, Inc. v. Norfolk Southern Ry. Co.*, 420 F.3d 1243, 1246 (11th Cir. 2005), the

(Continued on following page)

IV. Conclusion

The District Court erred in concluding that the Lewises' request for reimbursement for additional mortgage payments and loss incurred by virtue of the decrease in the sale price of their Pennsylvania home were not "determinable" claims under § 370.3(b)(3). Hence, we will vacate the District Court's order and remand for further proceedings consistent with this opinion.

Eleventh Circuit considered a claim that included an estimated damages amount of $25,000, not a claim that entirely lacked a dollar amount. The issue before the Eleventh Circuit was whether "[§ 370.3(b)] could be construed to invalidate . . . estimated damages [claims] . . . on the ground that such a [claim] is not specified or determinable." *Id.* at 1252. In the course of deciding that estimated damages amounts were permissible, the Eleventh Circuit noted that other circuit courts had held a shipper's claim invalid in "situations in which the shipper provided the carrier with no damage amount *at all*." *Id.* (emphasis in original). However, contrary to Atlas's contention, nothing in *Siemens* indicates that the Eleventh Circuit adopted the view that a dollar amount is always required. Instead, it concluded that cases that did not include dollar amounts were inapposite to the issue before it because the claim under consideration included an estimated damages amount. *Id.* Thus, Atlas's reading of *Siemens* is overly broad.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2688

RICHARD J. LEWIS;
PATRICIA A. LEWIS

Appellants,

v.

ATLAS VAN LINES, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 06-cv-1862)
District Judge: Honorable John E. Jones, III

Argued June 3, 2008

Before: FISHER, JORDAN, *Circuit Judges*,
and YOHN*, *District Judge*.

JUDGMENT

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* Honorable William H. Yohn, Jr., Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on June 3, 2008. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the Judgment of the District Court entered on May 30, 2007, be the same is hereby VACATED and REMANDED, all of the above in accordance with the opinion of this Court. Costs to be taxed against Appellee.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: September 9, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. LEWIS AND PATRICIA A. LEWIS,	:	
Plaintiffs,	:	No. 4:CV 06-1862
v.	:	Judge Jones
ATLAS VAN LINES, INC.	:	
Defendant.	:	

MEMORANDUM

May 30, 2007

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

Pending before the Court Defendant Atlas Van Lines, Inc.'s Motion for Reconsideration, or, in the Alternative, Motion for Entry of Final Order to Permit Filing of Interlocutory Appeal ("the Motion") (doc. 20) filed on February 8, 2007.

For the following reasons, the Motion will be granted.

PROCEDURAL HISTORY:

On January 30, 2007, this Court issued a Memorandum and Order ruling that the Carmack Amendment, 49 U.S.C. § 14706, did not control the type of injuries sustained by the Plaintiffs as a result of the

Defendant's conduct and denying the Defendant's Motion to Dismiss.

Following the entry of our January 30, 2007 Memorandum and Order, the Defendant filed the pending Motion, arguing that the Court committed a clear error of law in holding that the Carmack Amendment was inapplicable to the case *sub judice*. The Motion has been fully briefed by the parties and is therefore ripe for our review.

STANDARD OF REVIEW:

Motions for reconsideration should be granted sparingly as federal courts have a strong interest in the finality of judgments. *Burger King Corp. v. New England Hood & Duct Cleaning Co.*, 2000 U.S. Dist. LEXIS 1022, at *2 (E.D. Pa. 2000). "The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (*quoting Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986)). "Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (*citing North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194,

1218 (3d Cir. 1995)). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Abu-Jamal v. Horn*, 2001 WL 1609761, at *9 (E.D. Pa. 2001).

FACTUAL BACKGROUND:

Plaintiffs Richard J. and Patricia A. Lewis ("Plaintiffs") entered into a contract to sell their residence at 3143 Seaks Run Road, Glen Rock, York County, Pennsylvania, with a settlement to be held before August 27, 2004. The sales agreement provided that the Plaintiffs would deliver "a vacant building" at the time of the closing. In order to transport their household possessions from their home in Pennsylvania to their new home in New York, the Plaintiffs entered into a contract with Warners Moving and Storage ("Warners"), an agent of the Defendant with Defendant Atlas Van Lines, Inc. ("Atlas"). Warner was to box the household belongings of the Plaintiffs, load the same on one or more appropriate motor vehicles, and deliver the same to the Plaintiffs' new residence in Alpine, New York.

A letter memorializing this agreement, dated July 27, 2004, was issued and executed by a sales representative of Warners. In pertinent part, the letter agreement provided as follows:

> This letter is to confirm that Warners Moving and Storage will arrive at your home on

> 8/23 & 8/24 to box the household belongings with loading the household effects on 8/25 & 8/26. Delivery is scheduled for 8/31 or 9/1.

(Rec. Doc. 1, Ex. 2).

Plaintiffs allege that pursuant to the contract, packers from Warners appeared on August 23 and 24, 2004 and boxed up the household belongings. At approximately 12:00 noon on August 25, 2004, Warners delivered a moving van to the Plaintiffs' Pennsylvania residence and Warners engaged in loading household belongings into the van until 5:00 p.m., at which time Warners advised the Plaintiffs that the moving van would be taken back to Warners' place of business because the tractor and crew were needed to handle a move to North Carolina on August 26, 2004. (Complaint, ¶14).

On August 26, 2004, Warners failed to appear and Plaintiffs attempted several times to contact Warners. Plaintiffs spoke with Joe Kilgore ("Kilgore"), who allegedly told them that Warners was "working on it and we'll take care of you." (Affidavit of Richard J. Lewis, Rec. Doc. 12, Ex. A at ¶5). No one appeared on behalf of Warners on August 27, 2004 to complete the loading of the van with Plaintiffs' household belongings. Plaintiffs allege they contacted Warners on August 27, 2004 and spoke to Jeff Warner at approximately 12:00 noon. Mr. Warner advised the Plaintiffs that there were no licensed drivers available to deliver a moving van to the Plaintiff's residence. (Complaint, ¶16). Plaintiffs alleged that

Plaintiff Richard Lewis told Jeff Warner that his "company was jeopardizing the sale of [his] property and that '[he] would hold them responsible.'" (Plaintiff's Aff., ¶6).

Because the Plaintiffs were unable to comply with the terms of the agreement of sale of their Pennsylvania residence by delivering a vacant home to the purchasers, they were in default under the sales agreement and the purchasers terminated the transaction at approximately 5:00 p.m. on August 27, 2004. (Complaint, ¶17). Plaintiffs allege that they contacted Mr. Warner a second time on August 27, 2004 and told him that the closing was not occurring because the house was not vacant and were informed that "the best he could do was to guarantee everything would be out by 12:00 noon on Saturday, August 28, 2004." Warners delivered a moving van to the Plaintiffs' residence on August 28, 2004 and Warners' employees worked until approximately 9:00 p.m., and completed loading the next day. (Plaintiff's Aff. ¶¶7-8).

Plaintiffs' interstate shipment was moved pursuant to Atlas' Household Goods Bill of Lading and Freight Bill Number C64174. (Rec. Doc. 5, Ex. B). Plaintiffs allege that they were first shown the Bill of Lading on August 26, 2004, when Plaintiff Richard Lewis signed the document indicating he reviewed the items to be shipped. Plaintiffs further allege that it was signed again by Plaintiff Richard Lewis on September 3, 2004 when the items were delivered in New York.

On October 26, 2004, Plaintiffs' attorney sent a letter to the Defendant making a claim for the losses arising out of the breached contract, identifying those losses as "loss of profit on the sale of their residence, additional mortgage payments and that Mr. and Mrs. Lewis have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred." The letter goes on to explain that an exact number for the loss could not be provided "until they are able to sell their Pennsylvania residence." (Rec. Doc. 11, Ex. 2).

In response to the October 26, 2004 letter, Warners, through counsel, sent a letter to Plaintiffs' attorney dated November 4, 2004, wherein receipt of the October 26, 2004 letter was acknowledged. Warners' letter requested additional information and documentation from Plaintiffs in an effort to evaluate the claim. (Rec. Doc. 5, Ex. D).

Plaintiffs allege that their Pennsylvania property was sold on June 3, 2005 pursuant to an Agreement of Sale executed on March 14, 2005. On November 9, 2005, Plaintiffs sent a letter to Defendant fully explaining the damages after the sale of Plaintiffs' residence and providing a detailed spreadsheet showing expenses incurred and losses because of the breached contract. (Rec. Doc. 11, Ex. 4).

DISCUSSION:

The Defendants argue that the actions and alleged omissions related to the packing and loading of Plaintiffs' goods – and the alleged resultant failure to remove all of the goods from the Plaintiffs' Pennsylvania residence – are clearly and unquestionably within the scope of the Carmack Amendment and this Court's ruling to the contrary was a clear error of law. The Defendants submit that the Court's analysis of whether the July 27, 2004 letter constituted a separate "operative document" which controlled the packing of Plaintiffs' household goods is misplaced, because the packing and loading services provided by the Defendant are clearly within the exclusive scope of the Carmack Amendment.

A. The Carmack Amendment

In 1906, Congress enacted the Carmack Amendment which created a national policy regarding an interstate carrier's liability for damages arising from the interstate transportation of goods. *See* 49 U.S.C. § 14706; *New York, New Haven & Hartford Railroad Co. v. Nothnagle,* 346 U.S. 128, 131 (1953). The Carmack Amendment "codifies the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the

commodity." *Secretary of Agriculture v. United States*, 350 U.S. 162, 166 n. 9 (1956).

The Carmack Amendment provides the exclusive remedy against an interstate common carrier for breach of a carriage contract. *Diamond Transp. Group, Inc. v. Emerald Logistics Solutions, Inc.*, 2006 U.S. Dist. LEXIS 42918, *7 (E.D. Pa.). Under the Carmack Amendment, carriers are fully liable for actual loss or injury to property. *Carmana Designs, Ltd. v. North Amer. Van Lines, Inc.*, 943 F.2d 316, 319 (3d Cir. 1991). To establish a *prima facie* case against a carrier under the Carmack Amendment, a shipper must prove (1) delivery of goods to the initial carrier in good condition; (2) damage of the goods before delivery to their final destination; and (3) the amount of damages. *Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc.*, 318 F.3d 458, 461 (3d Cir. 2003).

"Packing" and "loading" of household goods are considered "transportation services" that fall within the scope of the Carmack Amendment. 49 U.S.C. § 13102 specifically provides that "handling, packing [and] unpacking" are services included within the definition of "transportation" for purposes of Carmack. Additionally, 49 U.S.C. § 13102(12) provides that a "household goods motor carrier" offers within its scope of services "protective packing and unpacking of individual items at personal residences" and "loading and unloading at personal residences."

The scope of the Carmack Amendment's coverage is broad. The United States Supreme Court succinctly

described the breadth of the Carmack Amendment in *New York, Philadelphia and Norfolk R.R. Co. v. Peninsula Produce Exch. Of Md.*, 240 U.S. 34, 38 (1916), when it stated that the Carmack Amendment is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination."

B. Reconsideration Analysis

In our January 30, 2007 Memorandum and Order, we concluded that the Carmack Amendment did not govern this action because the type of injury sustained by Plaintiffs was not contemplated by Carmack. Within the instant Motion, Defendants argue that the alleged actions, omissions and resulting injuries are within the scope of the Carmack Amendment.

The Defendant submits that once it began the "transportation" services of packing and loading the Plaintiffs' household goods on August 23, 2004, the controversy arising thereafter automatically fell completely and exclusively within the scope of the Carmack Amendment. Defendant further agues that the existence or enforceability of the July 27, 2004 "letter agreement" does not affect whether the Carmack Amendment applies, but only bears relevance to whether the Defendant has notice of the consequential damages which would apply if the transportation services were not timely performed by it.

As noted above, the Carmack Amendment is "comprehensive" and specifically covers "packing" and "loading" of household goods. *See* 49 U.S.C. § 13102. Upon review of the Motion and supporting briefs, it is clear to the Court that we committed an error of law in holding that the Carmack Amendment did not apply to the instant controversy inasmuch as our reliance on the July 27, 2004 "letter agreement" was misplaced. Plaintiffs' damages, albeit unforeseen, were incurred as result of the Defendant's alleged "failure to discharge [its] duty with respect to any part of the transportation to the agreed destination." *Peninsula Produce*, 240 U.S. at 38.

C. Rule 12(b)(6) Analysis

In ruling that we erred in failing to apply the Carmack Amendment to the case *sub judice*, we must now determine whether Plaintiffs' claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) with the overlay of the Carmack Amendment.

The Carmack Amendment itself does not state what must be included in a claim against a carrier but rather prohibits the carrier from shortening the time for such a claim, stating that "a carrier may not provide by rule, contract or otherwise a period of less than nine months for filing a claim against it under this section and a period of less than two years from bringing a civil action against it under this section." 49 U.S.C. § 14706(e). Federal regulations govern the filing and processing of claims for delay in the

delivery of household goods. *See* 49 C.F.R. § 370. These regulations are incorporated into the Defendant's tariffs, which are incorporated into the Bill of Lading. 49 C.F.R. § 370 sets forth the following requirements for filing a delay claim:

(a) A written or electronic communication filed within the time limits specified in the bill of lading;

(b) The communication must contain facts sufficient to identify the baggage or shipment at issue;

(c) The communication must assert liability for the loss, damage or delay against the carrier; and,

(d) The communication must assert a claim for the payment of a specified or determinable amount of money.

Plaintiffs contend that the October 26, 2004 letter from Attorney Gent meets these requirements because it contains facts sufficient to identify the shipment, asserts liability and makes a claim for the payment of a determinable amount of money, that being "Mr. and Mrs. Lewis' losses including, but are not limited to, loss of profit on the sale of their residence, additional mortgage payments that Mr. and Mrs. Lewis have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred." Defendant argues that Plaintiffs

failed to provide timely notice of a specified or determinable claim to it or its agent within the time period prescribed by the Bill of Lading.[1] Defendant argues that Plaintiffs, by their own admissions, became aware of the "new" purchase of their Pennsylvania residence when they executed the Agreement of Sale on March 14, 2005, and therefore they had over two and a half months (until June 3, 2005) to ascertain their specific and determinable damages. Additionally, Defendant argues that the closing on the Pennsylvania residence occurred exactly on June 3, 2005, and surely the Plaintiffs would have known the exact amount of damages allegedly caused by the delayed pick up of their goods at the completion of the closing on June 3, 2005. Instead, Plaintiffs transmitted a specified damages amount to the Defendant under cover of letter dated November 9, 2005. The spreadsheet indicating the amounts shows a transmission date of July 8, 2005, but nonetheless, the Defendant did not receive it until November 9, 2005.

There is a split in the federal circuit courts concerning the standard to be used to determine whether a shipper's damages claim is sufficient. The dueling standards are "strict compliance" and "substantial performance." Plaintiffs cite to dicta contained in *S&H Hardware & Supply v. Yellow*

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[1] Plaintiffs' household goods were delivered to their residence in Alpine, New York on September 3, 2004. Pursuant to the Bill of Lading, the deadline for filing a claim with the carrier was nine months later, or June 3, 2005. (Rec. Doc. 5, Ex. B).

Transport, 432 F.3d 550, 554 (3d Cir. 2005) to support its contention that the Third Circuit has indicated it would follow the "substantial performance" standard. In *Yellow Transport*, the Third Circuit discussed the applicability of the "substantial performance" standard as it related to whether a communication was to be considered written notice at all. The case did not address the contents, adequacy, sufficiency or determinability of the notice of damages claim, and therefore is simply not persuasive on the point for which Plaintiffs cite it.

The parties seem to concede that if the Court utilized the "strict compliance" standard that Attorney Gent's letter would not be considered sufficient notice because no firm dollar amount was included. However, even if the Court applied the "substantial performance" standard, the Plaintiffs have not cited to, nor have we been able to find, any case where the shipper provided the carrier with no dollar amount whatsoever. What is clear is that the Plaintiffs failed to provide the Defendant with any additional information regarding the amount of their alleged claims until November 9, 2005, which was over sixteen months from the date of the alleged delay in the pickup of their household goods and over five months from the deadline created by the Bill of Lading. This delay in communication occurred even though the Plaintiffs knew of the sale price of their Pennsylvania residence when they executed the Agreement of Sale

on March 14, 2005 and closed on the sale on June 3, 2005.[2] We can find no reason to excuse the Plaintiffs' delay in communicating the specified damages to the Defendant. Because Plaintiffs' notice was insufficient as a matter of law, their claim is time-barred and shall be dismissed.

CONCLUSION:

Accordingly, for the foregoing reasons, we shall grant the Defendant's Motion as we made a clear error of law in holding that the Carmack Amendment did not apply to the instant action. In applying the Carmack Amendment to the matter, we find that the Plaintiffs have failed to state a claim upon which relief can be granted. Their notice to the Defendant was insufficient as a matter of law under Carmack because it failed to state specified or determinable damages. Therefore, the action shall be dismissed. An appropriate Order shall issue.

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[2] While an exception to timely notice is available to a shipper who cannot, with "reasonable diligence" ascertain the extent of its loss, this is certainly not the case here for the reasons stated herein. *See Cherkis v. Atlas Van Lines*, 59 F. Supp. 2d 203, 207 (D. Mass. 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD J. LEWIS AND PATRICIA A. LEWIS, Plaintiffs,	:	No. 4:CV 06-1862 Judge Jones
v.	:	
ATLAS VAN LINES, INC. Defendant.	:	

ORDER

May 30, 2007

In conformity with the Memorandum issued in the above-captioned matter on today's date, it is hereby ORDERED that:

1. Defendant's Motion for Reconsideration (doc. 20) is GRANTED to the extent that the Carmack Amendment applies to the instant matter.

2. This action is DISMISSED for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

3. The Clerk shall CLOSE the file on this case.

/s/ John E. Jones III
John E. Jones III
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2688

RICHARD J. LEWIS;
PATRICIA A. LEWIS

Appellants,

v.

ATLAS VAN LINES, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 06-cv-1862)
District Judge: Honorable John E. Jones, III

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING *EN BANC*

Present: SCIRICA, *Chief Judge*, SLOVITER,
McKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,

JORDAN, and HARDIMAN, *Circuit Judges*,
and YOHN*, *District Judge*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

/s/ Kent A. Jordan
Circuit Judge

Dated: October 9, 2008

TYW/smw/cc: James J. West, Esq.
James A. Wescoe, Esq.

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* Honorable William H. Yohn, Jr., Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation, limited to panel vote only.

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 14706. Liability of carriers under receipts and bills of lading

(a) General liability. –

(1) Motor carriers and freight forwarders. – A carrier providing transportation or service subject to jurisdiction under sub-chapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carlier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) Freight forwarder. – A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) Apportionment. – The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) Special rules. –

(1) Motor carriers. –

(A) Shipper waiver. – Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the

provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) Carrier notification. – If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules or practices.

(C) Prohibition against collective establishment. – No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) Water carriers. – If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering

carrier is the same as the liability of the water carrier.

(d) Civil actions. –

(1) Against delivering carrier. – A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) Against carrying responsible for loss. – A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) Jurisdiction of courts. – A civil action under this section may be brought in a United States district court or in a State court.

(4) Judicial district defined. – In this section, "judicial district" means –

(A) in the case of a United States district court, a judicial district of the United States; and,

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) Minimum period for filing claims. -

(1) In general. – A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) Special rules. – For the purposes of this subsection –

(A) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) Limiting liability of household goods carriers to declared value. –

(1) In general. – A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify,

eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(2) Full value protection obligation. – Unless the carrier receives a waiver in writing under paragraph (3), a carrier's maximum liability for household goods that are lost, damaged, destroyed, or otherwise not delivered to the final destination is an amount equal to the replacement value of such goods, subject to a maximum amount equal to the declared value of the shipment and to rules issued by the Surface Transportation Board and applicable tariffs.

(3) Application of rates. – The released rates established by the Board under paragraph (1) (commonly known as "released rates") shall not apply to the transportation of household goods by a carrier unless the liability of the carrier for the full value of such household goods under paragraph (2) is waived, in writing, by the shipper.

(g) Modifications and reforms. –

(1) Study. – The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) Factors to consider. – In conducting the study, the Secretary, at a minimum, shall consider –

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) Report. - Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations, for implementing modifications or reforms identified by the Secretary as being appropriate.

Part 370-PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE.

§370.1 Applicability of regulations.

The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to 49 U.S.C. subtitle IV, part B.

§370.3 Filing of claims.

(a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury

or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and:

(1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property,

(2) Asserting liability for alleged loss, damage, injury or delay, and,

(3) Making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however,* That where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspections reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars or cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as $100 more or less, the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim is filed in writing for a specific or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or

overlapping claims and shall require further substantiation, on the part of each claimant of his/her title to the property involved or his/her right with respect to such claim.

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Richard J. Lewis &	:	**NO.**
Patricia A. Lewis	:	
xxx xxx xxx	:	
Alpine, NY 14805	:	
Plaintiffs	:	
	:	
v.	:	**Jury Trial Demanded**
Atlas Van Lines, Inc.	:	
1212 St. George Road	:	
Evansville, lN 47711,	:	
and	:	
Defendant	:	

COMPLAINT

NOW COMES, this 23rd day of August, 2006, the Plaintiffs, **Richard J. Lewis** and **Patricia A. Lewis**, by their attorneys, **Douglas H. Gent, Esquire**, and **Eric R. Dutcher, Esquire**, and file the within Complaint, to wit:

1. Plaintiffs are adult individuals currently residing at xxx xxx xxx, Alpine, NY 14805.

2. Defendant, Atlas Van Lines, Inc., (hereinafter referred to as "Atlas") is an Indiana corporation with its principal place of business located at 1212 St. George Road, Evansville, IN 47711. Atlas does business in the Commonwealth of Pennsylvania by providing moving and storage services to individual homeowners.

3. Defendant does business in York County, Pennsylvania through its agent, Warners Moving and Storage (hereinafter referred to as "Warner") having its principal place of business located on West Country Club Road, Red Lion, PA 17356.

4. Warners engages in the business of moving and storing personal property including moving household goods and other personalty of individuals who are moving from one residence to another residence both intrastate and interstate. Warners is a local agent for Atlas.

5. Plaintiffs owned and lived in a personal residence located at xxx xxx xxx xxx, Glen Rock, PA 17327.

6. Plaintiffs entered into an Agreement of Sale dated July 19, 2004, with Bruce D. and Crystal L. Gibbons for the sale of the Plaintiffs' residence located at xxx xxx xxx xxx, Glen Rock, PA. Said Agreement of Sale established that settlement was to occur on or before August 27, 2004. A copy of said Agreement of Sale is attached hereto as Exhibit A and incorporated herein by reference as though set forth in full.

7. The Plaintiffs intended to move to their new residence located at xxx xxx xxx, Alpine, NY 14805.

8. Paragraph 15 of the Agreement of Sale states, in pertinent part, as follows:

"a. Title shall be tendered by way of warranty deed and possession is to be delivered by keys **to a vacant building** . . . ".

9. Pursuant to the Plaintiffs' obligation under paragraph 15 of the Agreement of Sale, and in order to transport their personalty to their new residence in Alpine, New York, the Plaintiffs entered into an oral agreement with Warners Moving & Storage, as agent for Atlas, to box the household belongings of the Plaintiffs, load the same on one or more appropriate motor vehicles, and deliver the same to the Plaintiffs' new residence in Alpine, New York. It is believed, and therefore averred that said agreement was an oral agreement subsequently memorialized in writing by a letter dated July 27, 2004, issued and executed by Warners. A copy of said letter is attached hereto and incorporated herein by reference as Exhibit B.

10. The terms of the contract set forth in the letter of July 27, 2004, specifically state that Warners would be at the Plaintiffs' Pennsylvania residence on August 23 and August 24 to box the household belongings, load the same onto one or more moving vans on August 25 and August 26, 2004, and deliver the same to the new residence in Alpine, New York on September 1, 2004. Attached to said letter was a document entitled "Household Goods Transportation Estimate for Richard Lewis".

11. The letter of July 27, 2004, identifies Warners as an interstate agent for Atlas.

12. Settlement on the sale of the Plaintiffs' Pennsylvania residence was scheduled for 4:00 p.m. on August 27, 2004.

13. Pursuant to the terms of the contract, packers for Warners appeared on August 23 and 24, 2004, to box up household belongings.

14. At approximately 12:00 noon on August 25, 2004, Warners delivered a moving van to the Plaintiffs residence and Warners engaged in loading household belongings into the van until 5:00 p.m. At said time, Warners advised the Plaintiffs that the moving van would be taken back to Warners place of business because the tractor and the crew were needed to handle a move to North Carolina on August 26, 2004.

15. Warners failed to appear on August 26, 2004 to load the moving van in accordance with its contractual obligations to the Plaintiffs. On August 26, 2004, the Plaintiffs attempted several times to contact Warners speaking with one Joe Kilgore, who did not provide any satisfactory response.

16. No one appeared on behalf of Warners on August 27, 2004, to complete loading the van with the Plaintiffs household belongings. The Plaintiffs contacted Warners on August 27, 2004, speaking with one Jeff Warner at approximately 12:00 noon. Mr. Warner advised the Plaintiffs that there was no licensed driver available to deliver a moving van to the Plaintiffs' residence to load household effects.

17. As a result of the Plaintiffs' inability to comply with the terms of the Agreement of Sale for their residence by delivering a vacant house to Mr. and Mrs. Gibbons, the Plaintiffs were in default under the Agreement of Sale. Mr. and Mrs. Gibbons terminated the transaction at approximately 5:00 p.m. on August 27, 2004.

18. Warners delivered a moving van to the Plaintiffs' residence at approximately 9:00 a.m. on August 28, 2004, and worked until approximately 9:00. p.m. At that time Warners advised the Plaintiffs that a second moving van would be needed.

19. Warners delivered a second moving van to the Plaintiffs' residence on August 29, 2004, and completed loading the household belongings of the Plaintiff.

20. Warners delivered the Plaintiffs' household belongings to the Plaintiffs' residence in Alpine, New York on or about September 3, 2004.

21. On August 26, 2004, at approximately 5:00 p.m., Warners presented the Plaintiffs with a Household Goods Bill of Lading and Freight Bill, a copy of which is attached hereto as Exhibit C, and incorporated herein by reference as though set forth in full. Said Household Goods Bill of Lading and Freight Bill indicates that the Plaintiffs had previously paid $10,473.19 under the terms of the contract to guarantee performance by Warners of its obligations under its contract with the Plaintiffs. The Plaintiff Richard J. Lewis was requested to execute a

box on the left hand side of the Bill of Lading on August 26, 2004, addressing the issue of adding items to be shipped after a "survey" had been completed by Warners of the quantity of household belongings to be shipped. Subsequently, on September 3, 2004, the Plaintiff Richard J. Lewis signed the bottom of the Bill of Lading acknowledging receipt of shipment and that the goods were in good condition.

22. The Plaintiffs immediately re-listed their Pennsylvania residence for sale. On or about March 14, 2005, the Plaintiffs entered into a new Agreement of Sale with Charles E. and Constance B. Patterson for the sale of the Pennsylvania residence. Settlement on the subsequent sale took place on June 3, 2005. A copy of the Agreement of Sale is attached hereto as Exhibit D and incorporated herein by reference as though set forth in full.

23. The first Agreement of Sale was for a sale price of $315,000.00 and the subsequent sale price was $280,000.00 resulting in a loss to the Plaintiffs on the sale of their Pennsylvania residence in the amount of $35,000.00.

24. At the time of the sale of the Plaintiffs' residence, they had a first mortgage with GMAC Mortgage Corporation and a second mortgage with Sovereign Bank. As a result of the delay in the sale of the Plaintiffs' Pennsylvania residence they paid additional interest on their first mortgage in the amount of $7,772.39 and on their second mortgage in the amount of $1,070.78. As a result of the delay in

the sale of the Plaintiffs' Pennsylvania residence, the Plaintiffs incurred the following additional costs:

a. Additional electric utility bills $435.00;

b. Additional telephone bills $249.20;

c. Additional ADT Security System charges $206.55;

d. Additional homeowner's insurance premium $339.03;

e. Additional gas utility bills $371.70;

f. Additional County and Borough real estate taxes $570.69;

g. Additional school district real estate taxes $2,549.97.

25. As a result of the reduced sale price on the sale that took place on June 3, 2005, the Plaintiffs. incurred a reduced cost for real estate commissions and realty transfer taxes in the amount of $1,050.00. Further, at the closing that took place on June 3, 2005, the Plaintiffs received a reimbursement of $733.05 as a proration of the above-identified real estate taxes.

26. The new residence of the Plaintiffs located in Alpine, New York was a newly built house. The Plaintiffs obtained a construction mortgage to construct said house. If the sale of the Plaintiffs' Pennsylvania residence had closed on August 27, 2004, as planned, the Plaintiffs would have used a portion of

the net proceeds to pay off the construction mortgage in the amount of $87,946.48.

27. As a result of the failure to close on the sale of the Plaintiffs' Pennsylvania residence on August 27, 2004, the Plaintiffs had to withdraw $87,946.48 from a 401(k) retirement plan to pay off the construction mortgage. This resulted in the Plaintiffs incurring unplanned federal income taxes in the amount of $19,328.27 and New York State income taxes in the amount of $5,825.93.

28. On or about October 26, 2004 through Plaintiff's legal counsel, Plaintiff notified Warners, agent for Atlas that the Plaintiffs would be presenting a claim for losses incurred by reason of Warners and Atlas' failure to perform their contractual obligations to the Plaintiff and/or arising out of their negligence in failing to properly provide for adequate licensed drivers and trucks to perform their contractual obligations on a timely basis.

29. On or about November 9, 2005, the Plaintiffs issued a letter to Warners and Atlas setting forth in detail the extent of the Plaintiffs' losses and a demand for payment of the same. The Plaintiffs had previously advised the Defendants that the specifics of their claim would be presented subsequent to the final sale of the Plaintiffs' Pennsylvania residence.

30. On or about December 15, 2005, the Plaintiffs, through legal counsel, received notice from Atlas and Warners rejecting the Plaintiffs' claim for damages.

31. The amount in controversy exceeds the jurisdictional limits for compulsory arbitration in York County, Pennsylvania.

COUNT I

LEWIS V. ATLAS

BREACH OF CONTRACT

32. Paragraph 1 through 31 are incorporated herein by reference as though set forth in full.

33. Pursuant to the terms of the contract between the Plaintiffs and Warners, interstate agent for Atlas, the Defendant was obligated to provide sufficient personnel and moving vans no later than August 25 and August 26, 2004 to fully and completely load all of the household items and personalty of the Plaintiffs for transport to Alpine, New York.

34. The Defendant breached the contract with the Plaintiffs by failing to provide sufficient personnel and moving vans on August 25 and August 26 to perform its contractual obligations to the Plaintiffs.

35. The Defendant failed to provide adequate personnel and moving vans until August 28, 2004.

36. As a result of the Defendant's breach of contract, the Plaintiffs have been damaged in the amount of $71,729.91.

37. Despite repeated requests, the Defendant has failed to pay said sum to the Plaintiffs to compensate for their losses arising out of the Defendant's breach of contract.

WHEREFORE, the Plaintiffs respectfully request the Honorable Court to enter judgment in their favor and against the Defendant in the amount of $71,729.91 plus reasonable attorney's fees, costs, expenses, and pre and post-judgment interest.

COUNT II

LEWIS V. ATLAS

NEGLIGENCE

38. Paragraphs 1 through 37 are incorporated herein by reference as though set forth in full.

39. The Defendant, upon entering into a contract with the Plaintiffs to move the Plaintiffs' household personalty from their Pennsylvania residence to their New York residence, owed the Plaintiffs a duty to provide adequate personnel, trucks and moving vans on a timely basis to vacate the Pennsylvania residence.

40. The Defendant knew, based upon several communications from the Plaintiffs, that the Plaintiffs were selling their Pennsylvania residence, closing on August 27, 2004, and had to have the Pennsylvania residence vacated before said date

pursuant to the Plaintiffs contractual obligations with the purchasers of the Pennsylvania residence.

41. The Defendant was negligent in the performance of its contractual duties. The Defendant's negligence consisted of the following:

a. Failure to provide adequate personnel to load the moving van(s) on a timely basis;

b. Failure to provide adequate personnel, including, but not limited to a licensed driver to deliver one or more moving vans to the Plaintiffs' Pennsylvania residence to load Plaintiffs' household personalty;

c. Failure to provide adequate personnel to transport the Plaintiffs' household personalty from the Pennsylvania residence to the New York residence no later than August 26 and/or August 27, 2004.

42. As a result of the negligence of the Defendant as set forth above, the Plaintiffs have incurred a loss of $71,729.91.

43. The negligence of the Defendant is the proximate cause of the Plaintiffs' losses.

WHEREFORE, the Plaintiffs respectfully request the Honorable Court to enter judgment in their favor and against the Defendant in the amount of

$71,729.91 plus reasonable attorney's fees, costs, expenses, and pre and post-judgment interest.

Respectfully submitted

BY: /s/ Douglas H. Gent
Douglas H. Gent, Esquire
Sup. Ct. I.D. #29964
1157 Eichelberger Street
Hanover, PA 17331
(717) 632-4040
Attorneys for the Plaintiff

VERIFICATION

I, **Patricia A. Lewis**, verify that the statements made in this Petition are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: 7-17-06 /s/ Patricia A. Lewis
Patricia A. Lewis

VERIFICATION

I, **Richard J. Lewis**, verify that the statements made in this Petition are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: July 17, 2006 /s/ Richard J. Lewis
Richard J. Lewis

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

Richard J. Lewis &	:	**NO.**
Patricia A. Lewis	:	
xxx xxx xxx	:	
Alpine, NY 14805	:	
Plaintiffs	:	
v.	:	
Atlas Van Lines, Inc.	:	**Jury Trial Demanded**
1212 St. George Road	:	
Evansville, IN 47711, and	:	
Warners Moving & Storage	:	
P.O. Box 269	:	
West Country Club Road	:	
Red Lion, PA 17356	:	
Defendants	:	

CERTIFICATE OF SERVICE

The undersigned, being duly sworn, does hereby state that a true and correct copy of the Complaint was served by Certified Mail on Atlas Van Lines, Inc., to the following:

Todd A. Suter
Corporate Counsel
Atlas Van Lines, Inc.
1212 St. George Road
Evansville, IN 47711

Respectfully submitted

BY: /s/ Douglas H. Gent
Douglas H. Gent, Esquire
Sup. Ct. I.D. #29964
1157 Eichelberger Street
Hanover, PA 17331
(717) 632-4040

Attorneys for the Plaintiff

Exhibit A

FORM#RAYAC-201
Rev. 08/03

AGREEMENT OF SALE

Form approved by REALTORS® Association of York and Adams Counties, Inc.

BROKER: Jack Gaughen ERA SALES ASSOCIATE Mary Ann [Illegible]
Acting as: (✓) Buyer's Agent ( ) Transaction Licensee
( ) Sub-Agent ( ) Dual Agent
( ) Designated Agent for Buyer with Broker as Dual Agent of Seller and Buyer

App. 64

IN COOPERATION WITH

BROKER: Country Home SALES ASSOCIATE Ingrid Lochte
Acting as: (✓) Sub-Agent ( ) Transaction Licensee ( ) Dual Agent
( ) Designated Agent for Buyer with Broker as Dual Agent of Seller and Buyer

THIS AGREEMENT is made this 19th day of July 2004

1. **PARTIES: Between** Richard J. & Patricia Lewis hereinafter called Seller, and Bruce D. & Crystal L. Gibbons (residing at xxx xxx xxx, Md Zip 21014) hereinafter called Buyer.

2. **PROPERTY:** Seller hereby agrees to sell and convey to Buyer, who hereby agrees to purchase: ALL THAT CERTAIN tract of ground with improvements thereon, if any, known as xxx xxx xxx xxx, Glen Rock MLS 20401088

Municipality Springfield Twp., County York, State PA Zip 17327
Identification: (Tax ID#; Parcel #; Dead Book/Page) ES 31F

3. **ZONING:** The ZONING CLASSIFICATION of the property is Agric. . Failure of this Agreement to contain the zoning classification (except in cases where the property and each parcel thereof, if subdividable, is zoned fully or primarily to permit single family dwellings) shall render this Agreement voidable at the option of the buyer, and, if voided, any deposit tendered by the Buyer shall be returned to the Buyer without any requirement for court action.

4. **PURCHASE PRICE:** The purchase price is $ 210,000 to 315,000 Three Hundred Fifteen Thousand and no/100 Dollars) to be paid in cash or equivalent at time of settlement.

5. **DEPOSITS:** Security for the purchase is to be as follows:

a) Cash/check at signing of this Agreement. $ 1,000.00

b) Cash/check on or before _____ $ _____

c) Note/other (specify) balance at [illegible] $ 309.000.00

6. **FINANCING CONTINGENCY:** This sale is contingent upon the following financing for Buyer: 5815 First/[Illegible]

a) The amount of financing $ 290,000.00 , is for a term of 30 years. The type of financing Conv. (Fixed/Adjustable/Insured) Interest rate of ____%; however, Buyer agrees to accept the interest rate as may be committed by the mortgage lender, not to exceed a maximum interest rate at 6.25%.

b) The Seller agrees to pay Buyer's closing costs, including prepaid expenses in the maximum amount of -0- .

c) The maximum financing placement, origination, or loan discount fees, or similar charges, to be paid by BUYER shall not exceed -0- % of loan amount.

d) Unless otherwise agreed by Seller, Buyer's financing shall not be contingent upon sale or settlement of any real estate owned by Buyer.

e) Buyer shall make a completed application including payment for appraisal and credit report to a responsible lending institution on or before PREAPPROVED 7/24/04 . Should the Buyer fail to make such completed application within the specified time, it shall be the option of the Seller to declare this Agreement of Sale null and void at which time all deposit monies paid on account shall be forfeited to the Seller as liquidated damages and all copies of this Agreement shall be returned to the Seller's agent for cancellation. Financing terms as stated above cannot be changed without written agreement of all parties.

f) A written mortgage commitment must be obtained by 8-15-04 . If a written commitment is not received by the above date, Buyer and Seller agree to extend the commitment date until Seller terminates this Agreement in writing; and in such event, any deposit shall be returned to Buyer.

App. 65

7. **ADDITIONAL TERMS AND CONTINGENCIES ARE:**

a) Written acceptance of all parties must be obtained on or before: July 21, 2004

b) Settlement is to be made on or before August 27, 2004

c) Possession is to be delivered: At settlement

d) Payment of transfer taxes will be divided equally between Buyer and Seller.

e) All income and expenses, including but not limited to real estate taxes, rents, water, sewer and refuse charges, condo fees, homeowners association fees and similar charges, public or private, shall be prorated to date of (settlement/possession) on a fiscal year basis.

f) Beware home is safe locked for settlement on 8/27/04. [Illegible] will provide Buyer with a [illegible] at settlement.

8. **FIXTURES, TREES, SHRUBBERY, ETC.:** All plumbing, heating, air conditioning and electrical systems and fixtures and systems appurtenant thereto and forming a part thereof, antennas, masts and rotor systems; screens, storm windows and/or doors, shades, awnings, blinds, drapery and curtain rods and hardware; radiator covers, kitchen cabinets, built-in appliances and wall-to-wall carpet, all trees, shrubbery, and plantings now on property, garage door openers, storage sheds, remaining heating and cooking fuels, excluding propane, stored on the property at time of settlement, all items included in the Seller Disclosure Statement, and [Illegible] system, [illegible], [illegible], [illegible] shed, [illegible], [illegible] are INCLUDED in the sale and purchase price. The following items are EXCLUDED from the sale: water softener

None of the above-mentioned included items shall be removed by Seller from premises after the date of this Agreement. Seller hereby warrants that Seller will deliver good title to all the articles described in this paragraph, and any other fixtures or items of personally specifically scheduled to be included in this sale.

9. **DISCLOSURES/INSPECTIONS IF ANY:** Buyer acknowledges receipt of the mandatory Seller Disclosure Statement [Illegible]; (initial) and of the following indicated written disclosures and/or addenda, all of which are made a part of this Agreement.

(✓) Disclosure and Inspection Addendum	( ) Lead-based Paint Brochure
( ) Dual Agency Addendum	( ) Lead-based paint Testing Contingency
( ) FHA Home Inspection Notice	(✓) Disclosure of Affiliated Business Relationships
( ) VA/FHA Amendatory Clause/ Certification	(✓) Addendum for Property Not Connected to Public Sewer
( )	(✓) [Illegible]

10. **ASSESSMENTS AND NOTICES:** As of the acceptance date of this Agreement, Seller represents the following:

a) No public assessment or notice of a future public assessment for any matter including water, sewer, sidewalk or curbs, has been made against the property.

b) Buyer acknowledges that taxes may increase due to change of assessment or millage rates.

c) No condominium or homeowners' association assessments, if any, remain unpaid.

d) Seller has no knowledge of any notice by any governmental or public authority relating to violations of zoning, housing, building, safety or fire ordinances or codes.

e) Buyer is advised that access to a public road may require issuance of a highway occupancy permit from the Department of Transportation.

f) Sellers of property enrolled in the Clean and Green program shall, as required by law, give the county assessor 30 days notice of the pending sale. If prior to settlement Seller receives any assessments or notices, as previously stated, then Seller shall immediately give notice to Buyers. Unless otherwise prohibited by law, Buyer will be responsible for any written notice served upon Seller after execution of this Agreement and for the payment thereafter of any public improvement and condominium or homeowners association assessments.

11. **RIGHT-TO-FARM LAW 3 P. S. SECTION 951-957;** The property you are buying may be located in an area where agricultural operations take place. Pennsylvania protects agricultural resources for the production of food and agricultural products. The law limits circumstances where normal agricultural operations may be subject to nuisance lawsuits or restrictive ordinances.

12. **TITLE AND COSTS:**

a) The Premises are to be conveyed free and clear of all liens, encumbrances and easements, EXCEPTING HOWEVER: Existing building restrictions, ordinances, easements of roads, easements visible upon the ground, privileges or rights of public service companies, if any; otherwise the title to the above-described real estate shall be good and marketable and such as will be insured by a reputable Title Insurance Company at the regular rates.

b) If the Seller cannot give a good and marketable title, such as will be insured by a reputable Title Insurance Company at regular rates, then the Buyer has the option of taking such title as the Seller can give without abatement of price or of being repaid all monies paid by Buyer to Seller on account of the purchase and the Seller will reimburse the Buyer for any costs incurred by the Buyer for inspections specified in paragraph #9 and #12(c) items (1), (2), (3), and in paragraph #12(d); and in the latter event there shall be no further liability or obligation on either of the parties hereto and this Agreement shall become NULL AND VOID and all copies will be returned to Seller's agent for cancellation.

c) The Buyer will pay for the following:

1) The premium for title insurance and/or title search, or fee for cancellation of same, if any.

2) The premiums for flood insurance and/or fire insurance with extended coverage, insurance binder charges or cancellation fee, if any.

3) Appraisal fees and charges paid in advance to mortgagee, if any.

4) Buyer's normal settlement costs.

d) Any survey or surveys which may be required by the Title Insurance Company or the abstracting attorney, for the preparation of an adequate legal description of the premises (or the correction thereof), shall be secured and paid for by the Seller. However, any survey or surveys desired by the Buyer or required by his/her mortgagee shall be secured and paid for by the Buyer.

13. **DOMESTIC RELATIONS LIEN:** Pennsylvania law requires county Domestic Relations Offices to impose property liens for overdue child support. If applicable, Buyer and Seller shall advise their agent/licensee so verification of lien status can be promptly determined.

14. **DEPOSIT AND RECOVERY FUND:** Deposits or hand monies shall be paid to Listing Broker, who shall retain the same until consummation or termination of this Agreement in conformity with all applicable laws and regulations. Listing Broker may hold any uncashed check tendered as deposit pending the acceptance of this offer. In the event of dispute for the return of deposit monies, Listing Broker will distribute the monies pursuant to a final order of court or the written

agreement of the parties. A real estate recovery fund exists to reimburse persons who have suffered monetary loss and have obtained an uncollectible judgment due to fraud, misrepresentation or deceit in a real estate transaction by a Pennsylvania licensee. For complete details, call 717-783-3658.

15. **TENDER AND POSSESSION:**

a) Title shall be tendered by way of warranty deed and possession is to be delivered by keys to a vacant building (if any) broom clean, free of debris or by deed and assignment of existing lease(s) at time of settlement if premises are tenant-occupied at the signing of this Agreement, unless otherwise specified herein.

b) Seller will not enter into any new leases, written extension of existing leases, if any, of the premises without expressed written consent of the Buyer.

c) Formal tender of an executed deed and purchase money is hereby waived.

d) Buyer reserves the right to make a pre-settlement inspection of the subject premises.

16. **MAINTENANCE AND RISK OF LOSS**

a) Seller shall maintain the property (including all items mentioned in paragraph #8 herein) and any personal property specifically scheduled herein in its present condition, normal wear and tear excepted.

b) Seller shall bear risk of loss from fire, or other casualties until time of settlement. In the event of damage to any property included in this sale by fire or by other casualties, not repaired or replaced prior to settlement Buyer should have the option of rescinding this Agreement and receiving all monies paid on account or of accepting the property in its then condition together with the proceeds of any insurance recovery obtainable by Seller. Buyer is hereby notified that he may insure his equitable interest in this property as of the time of the acceptance of this Agreement.

17. **RECORDING:** This Agreement shall not be recorded in the Office for the Recording of Deeds or in any other office or place of public record.

18. **ASSIGNMENT:** This Agreement shall be binding upon the parties, their respective heirs, personal representatives, guardians and successors, and to the extent assignable, on the assigns of the parties hereto, it being expressly understood, however, that the Buyer shall not transfer or assign this Agreement without the written consent of the Seller.

19. **DEFAULT:** Time shall be of the essence with respect to performance of any obligation arising under this Agreement. Compliance therefore must be made by the specified date(s) or Seller may, at Seller's sole election, hold Buyer in breach of this agreement. Should the Buyer: 1) fail to make any additional payments, as specified in paragraph #5, or 2) furnish false or incomplete information to the Seller, Seller's Agent

or the mortgage lender concerning the Buyers legal or financial status, or fail to cooperate in the processing of the mortgage loan application, which acts would result in the failure to obtain the approval of mortgage loan commitment, or 3) violate or fail to fulfill and perform any of the terms or conditions of this Agreement. The Seller may, at Seller's option, elect:

a) to declare the agreement of sale null and void; and

b) to proceed against the buyer for Seller's actual damages; or

c) to retain all deposit money paid on account as liquidated damages which amount the parties agree is a reasonable sum and not in the nature of a penalty.

Should the Seller violate or fail to fulfill and perform any of the terms and conditions of this Agreement, Buyer may elect:

a) to pursue Buyer's remedy for specific performance of the Agreement; or

b) proceed against the Seller for Buyer's actual damages; or

c) receive a return of the deposit money and also be entitled to receive an additional sum equal to the deposit money paid on the account as liquidated damages which amount the parties agree is a reasonable sum and not in the nature of a penalty.

20. **REPRESENTATIONS:** Seller represents that Seller has informed Buyer of any hidden or latent defects of which Seller has knowledge. It is understood that the Buyer has inspected the property and any personal property to be included in the sale or hereby waives the right to do so and has agreed to purchase it as a result of such inspection and not because of or in reliance upon any representations which were not included in this agreement whether made by any broker, transaction licensee or any of their respective sales people, employees, officers and/or partners.

    Buyer agrees that any and all statements, claims, advertisements, marketing, promotional exhibits, building and subdivision plans made or presented by Seller, brokers, their licensees, employees, officers, or partners are not incorporated in this agreement of sale unless expressly so stated to be made a part thereof. The Buyer has agreed to purchase the property in its present condition unless otherwise specified herein. It is further understood that this Agreement contains the whole Agreement between the Seller and the Buyer and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever concerning this sale. Furthermore, this Agreement shall not be altered, amended, changed or modified except in writing executed by the parties.

21. **RELEASE:** Buyer hereby releases, quit-claims and forever discharges seller, all agents, their subagents, employees and any officer or partner

of any one of them and any other person, firm or corporation who may be liable by or through them from any and all claims, losses or demands, in law or equity, including but not limited to personal injuries, property damage and any and all of the consequences thereof, whether now known or not, which may arise from the presence of mold, all wood-boring insects, radon, lead-based paint hazards, environmental hazards, any defects or deficiencies in the onlot sewage disposal system and/or on-site water service system, or any defects or conditions on the property. This release shall survive settlement.

22. **MEDIATION:** The Buyers, Sellers and Brokers agree that disputes relating to this Agreement SHALL be submitted to mediation in accordance with the rules and procedures of the dispute resolution system established by the REALTORS® Association of York and Adams Counties, Inc., and that if any agreement is reached by the Buyers, Sellers and Brokers pursuant to a mediation conference, it shall be binding upon them. Costs of mediation to be shared equally by Buyers, Sellers and Brokers named in the dispute. This duty to mediate disputes shall survive final settlement.

23. **EXECUTION:** This Agreement and any amendments thereto, maybe executed by the parties by way of transmission through a Facsimile (FAX) machine; such a copy shall have the same legal enforceability and binding effect upon the parties as though it were signed by all parties in original form.

APPROVAL BY BUYER: The Buyers hereto, intending to be legally bound hereby, have hereunder set their hands and seals the day and year first above written.

WITNESS
_____

WITNESS
/s/ Mary Ann Panicho

WITNESS
_____

BUYER
/s/ Bruce Gibbons (SEAL)

BUYER
/s/ Crystal Gibbons (SEAL)

BUYER
_____ (SEAL)

APPROVAL BY SELLER: Seller hereby accepts/counteroffers the above proposal this ___ day of _____, ____.

The effective date of this Agreement shall be the date on which the offer or any counteroffer is accepted as evidenced by the dated signature or dated initials.

WITNESS
_____

WITNESS
/s/ [Illegible]

WITNESS
_____

BUYER
/s/ Richard J. Lewis (SEAL)

BUYER
/s/ Patricia A. Lewis (SEAL)

BUYER
_____ (SEAL)

FORM#RAYAC-2-2
Rev. 12/02

DISCLOSURES AND INSPECTION ADDENDUM

Form approved by REALTORS® Association of York and Adams Counties, Inc.

DATE 7/17/04

RE: PROPERTY xxx xxx xxx xxx

SELLER: Richard J. & Patricia A. Lewis

BUYER: Bruce D. & Crystal L. Gibbons

It is understood and agreed that the above Agreement of Sale shall be endorsed as follows:

Seller and Buyer include the initialed paragraph(s) as supplemented by the applicable provisions on **THE REVERSE SIDE OF THIS DOCUMENT**, as part of the above-captioned Agreement.

IN THE EVENT THE INSPECTIONS, TESTS AND/OR CERTIFICATIONS, INCLUDING WRITTEN RESULTS FURNISHED TO SELLER, ARE NOT COMPLETED WITHIN THE PRESCRIBED TIME PERIOD STATED BELOW, THEN ALL PARTIES ACKNOWLEDGE THAT BUYER'S RIGHT TO CONDUCT SAID INSPECTIONS SHALL BE WAIVED UNLESS PRESCRIBED BY THE MORTGAGE LENDER, from whom buyer is securing a loan, in accordance with the mortgage contingency clause in the above-captioned Agreement.

___/___ Seller ___/___ Buyer **1. Condominium or Planned Community**
Public offering statement or resale certificate and related documents as applicable for condominium or Planned Community to be received on/or before _____
These documents cannot be waived.

___/___ Seller ___/___ Buyer **2. Wood Destroying Pest Inspection** Completed on/or before 7/29/04.

___/___ Seller ___/___ Buyer **3. On-Lot Waste Water Treatment System Inspection** Completed on/or before _____.

___/___ Seller ___/___ Buyer **4. Water Test:** ✓ Coliform Bacteria (Potability)
✓ FHAVA
__ Other: _____
Completed on/or before _____.

___/___ ___/___ **5. Other Inspection(s):**
Seller Buyer

___ Air Conditioning Completed on/or before _____.
___ Roof/Flashing Completed on/or before _____.
___ Plumbing Completed on/or before _____.
___ Heating Completed on/or before _____.
___ Electrical Completed on/or before _____.
___ Structural Completed on/or before _____.
___ Other: _____ Completed on/or before _____.

___/___ ___/___ **6. Whole House Inspection** Completed on/or before 7/29/04.
Seller Buyer
If Buyer elects to have a whole house inspection, unless specifically agreed by Buyer and Seller to the contrary, such inspection shall be performed in accordance with all of the provisions of the Pennsylvania Home Inspection Law. (See Pennsylvania Home Inspection Law notice on Reverse)

___/___ ___/___ **7. Radon Test** Completed on/or before 7/29/04.
Seller Buyer

___/___ ___/___ **8. Mold Inspection/Test** Completed on/or before _____.
Seller Buyer

WAIVER OF INSPECTIONS: Unless otherwise requested in paragraphs 1 through 8 by Buyer, or unless required by Buyer's mortgage lender, Buyer hereby acknowledges and agrees that Buyer unconditionally waives any and all rights to any pre-settlement tests, inspections or certifications concerning the condition of the subject property whatsoever. This waiver applies regardless of whether Buyer has acquired equitable interest in the property under the provisions of this Agreement of Sale.

All the inspections or re-inspections called for above are the Buyer's responsibility, and shall be Buyer's expense, unless otherwise prescribed by law or government regulation. Buyer agrees to pay for any indicated inspections whether or not settlement occurs. Provided, however, the cost of the On-Lot Waste Water Treatment System Inspections shall be allocated between the Buyers and Sellers as follows: Locating, Uncovering & Recovering Septic to be paid by Seller, Pumping Septic to be paid by Seller, Inspection to be paid by _____.

Upon the execution of this agreement, authority is hereby given to Buyer to select said inspection companies.

Buyer hereby states that he/she understands that he/she is not obligated to use any individual firm recommended or suggested by any Broker/salesperson involved in this transaction. However, if authority has been given such Broker/salesperson to order any tests or inspections, as evidenced by the preceding

paragraph, Buyer hereby releases Broker/salesperson from any claim arising out of their selection of any individual or firm.

Seller is hereby notified that all utilities must be connected and operational for a whole house inspection or specific component inspection and it is Seller's responsibility to have utilities on and available for inspector. Should utilities not be connected and re-inspection is required, cost shall be paid by Seller.

All other terms and conditions of the said Agreement shall remain unchanged and in full force and effect.

DEFINITIONS AND NOTICES

1. **CONDOMINIUM OR PLANNED COMMUNITY:**

   A prospective Buyer of a condominium unit or a property within a Uniform Planned Community has the option of canceling the Agreement of Sale with the return of all deposit monies, until a resale certificate has been provided to the prospective Buyer and for 5 days thereafter or until conveyance of the property, whichever first occurs.

2. **WOOD DESTROYING PEST INSPECTION:**

   A wood destroying pest infestation and damage report from a licensed exterminator. Such certification is to provide that an inspection of the readily accessible areas of the existing building(s) and other vulnerable improvements on the subject property has been made satisfactory to and in compliance with all applicable laws and the

requirements of any mortgage or lending institution or any agency providing federal insurance or guarantees. Seller may receive notice from the exterminator that there exists either active infestation(s) or evidence of previous infestation(s) and/or resultant damage, which has not been corrected.

3. **ON-LOT WASTE WATER TREATMENT SYSTEM INSPECTION:**

A written report from a qualified inspector that the sewage system is functioning properly. A proper test may include locating and uncovering septic system, pumping of tank and inspection of components existing in system. Vacant property may require additional testing which may include a hydraulic load test.

(NOTICE: Some municipalities may require outdated and malfunctioning on-lot systems to be replaced.)

4. **WATER TEST:**

Water test(s) from a certified laboratory according to standards established by the Environmental Protection Agency (EPA).

5. OTHER INSPECTIONS:

Written report(s) from qualified inspector(s) that at the time of inspection the indicated system(s) are in good working order and structurally sound (if structural inspection requested). With regard to plumbing, heating, roofing and flashing, age and normal wear and tear are not deficiencies.

6. **WHOLE HOUSE INSPECTION:** (68 Pa. C.S.A. §7501, et. seq., effective December 20, 2001)

a) The Home Inspection Law applies to residential real estate transfers of not less than one and not more than four residential dwelling units.

b) A home inspection under this law is a noninvasive, visual inspection of some combination of the mechanical, electrical or plumbing systems or the structural and essential components of a residential dwelling designed to identify material defects in those systems and components.

c) A home inspection under this law does not include an examination of a single system or component of a residential dwelling such as electrical or plumbing systems or its roof. It also does not include inspections that are limited to one or more of the following: wood destroying insects, wells, septic systems, air and air quality, and environmental hazards.

d) A material defect, if identified by a home inspection, is any problem with the property or any portion of it that would have a significant adverse impact on the value of the property or that involves unreasonable risk to people on the property. The law further states that a structural element or system that is near or beyond the end of its normal useful life is not by itself a material defect.

c) A material defect, therefore, does not generally include maintenance and cosmetic items unless they meet the definition above stated.

f) A home inspector is defined to be an individual who performs home inspections and is a member of a national home inspection association. The law requires that home inspectors provide customers with verifications that they are a member of such an organization.

7. **RADON TEST:**

A radon test from a qualified testing service indicating that radon gas, if present, is within limits deemed acceptable by the United States Environmental Protection Agency (EPA).

NOTICE TO SELLER/BUYER REGARDING RADON GAS:

a) Radon is a radioactive gas produced naturally in the ground by a normal decay of uranium and radium. Uranium and radium are widely distributed in trace amounts in the earth's crust. Descendants of radon gas are called radon daughters or radon progeny. Several radon daughters emit alpha radiation, which has high energy but short range.

b) Studies indicate the result of extended exposure to high levels of radon gas/radon daughters is an increased risk of lung cancer.

c) Radon gas originates in soil and rocks. It diffuses, as does any gas, and flows along the path of least resistance to the surface of the ground, and then to the atmosphere. Being a

gas, radon can also move into any air space, such as basements or crawl spaces, and permeate throughout the home.

d) If a house has a radon problem, it can usually be cured by (a) increased ventilation, and/or (b) preventing radon entry.

e) The EPA advises corrective action if the ANNUAL average exposure to radon daughters exceeds 0.02 working levels. Further information can be secured from the DEP, Bureau of Radiation Protection, PO Box 8469, Harrisburg PA 17105-8469, 1-800-23RADON or (717) 783-3594.

8. **MOLD INSPECTION/TEST:**

Buyer is hereby advised that mold and/or other microscopic organisms (commonly referred to as "Mold") may exist in, on or around the Property and such Mold may have the potential to cause health effects including, but not limited to, physical injuries, allergic and/or respiratory reactions or other problems, particularly in persons with immune system problems, young children and/or elderly persons.

Real estate Brokers/salespersons are not qualified to inspect property for mold or make recommendations or determinations concerning possible treatment of mold or its health or safety issues. The purpose of this disclosure is to put buyers on notice to conduct their own inspection/test regarding this matter, prior to closing, using appropriate, qualified experts.

SELLER, LISTING AGENT AND SELLING AGENT SHALL HAVE THE RIGHT TO A COPY OF ANY OF THE **ABOVE REPORTS**.

IMPORTANT NOTICE

IF ANY OF THE ABOVE REPORTS INDICATES A SUBSTANTIAL DEFECT EXISTS,* BUYER SHALL HAVE SEVEN (7) CALENDAR DAYS TO GIVE SELLER WRITTEN REPORT AND WRITTEN NOTIFICATION OF THESE CONDITIONS. If Buyer does not provide the Seller with said written report and written notification of defects within this 7 calendar day period then the Buyer waives the right to any indicated repairs. (***SUBSTANTIAL DEFECT: A single, non-cosmetic defect for which correction will exceed a cost of $300.00; or any defect which may adversely affect the health or safety of the occupants. The $300.00 value cited is non-cumulative and is not based on an accumulation of defects. If any discovered defect is not substantial as defined herein, Buyer agrees that Buyer shall have no right to demand correction of such defect and no right to void or cancel this Agreement.**

UPON RECEIPT BY SELLER OF NOTIFICATION FROM BUYER OR LENDER THAT SUBSTANTIAL DEFECTS EXIST WHICH MUST BE CORRECTED PRIOR TO FINAL SETTLEMENT, IN THAT EVENT, Seller shall have the right, unless prohibited by law or governmental regulation, to cure such substantial defect, and shall within seven (7) calendar days of

such notice, advise Buyer, in writing, whether or not the substantial defect shall be so corrected. If Seller agrees to pay for the correction of all such substantial defect this agreement shall remain in force and effect and shall survive final settlement. In such event, Buyer shall have NO right to void or cancel this agreement because of any such substantial defect.

If Seller elects not to correct the substantial defect, the Buyer shall then have the option of (a) accepting the property with the substantial defect as revealed by any inspection without abatement of price, or (b) of being refunded all earnest monies paid thus far by Buyer toward the purchase price. In the event the second option is exercised, there shall be no further liability or obligation of either Buyer or Seller, and this Agreement shall become NULL and VOID. However, in order to invoke this contingency, Buyer shall notify Seller, in writing, of his election within seven (7) calendar days after Buyer receives Seller's decision not to correct the substantial defect; otherwise, Buyer waives his/her right to exercise this option, and this agreement shall remain in full force and effect.

All other terms and conditions of the said Agreement shall remain unchanged and in full force and effect.

WITNESS
/s/ [Illegible]

WITNESS
/s/ Mary Ann Panicho

WITNESS
/s/ [Illegible]

BUYER
/s/ Bruce Gibbons 7/24/04
(SEAL)

BUYER
/s/ Crystal Gibbons 7/24/04
(SEAL)

BUYER

(SEAL)

WITNESS
/s/ [Illegible]

WITNESS
/s/ [Illegible]

BUYER
/s/ Richard J. Lewis
(SEAL)

BUYER
/s/ Patricia A. Lewis
(SEAL)

BUYER

(SEAL)

EXHIBIT B

[LOGO] Warners Moving & Storage
P.O. Box 269, West Country Club Rd., Red Lion, PA 17356
717-244-4537 800-233-1947
Fax 717-246-2919

Tuesday, July 27, 2004

Mr. Richard Lewis
xxx xxx xxx xxx
Glen Rock, Pa. 17327

Mr. Lewis:

This letter is to confirm that Warners Moving and Storage will arrive at your home on 8/23 & 8/24 to box the household belongings with loading the household effects on 8/25 & 8/26. Delivery is scheduled for 8/31 or 9/1. The final costs are based on the actual weight loaded onto the moving van. The only option left to decide on is what valuation (if any) you would like. Feel free to refer to the attached sheet in reference to the valuation levels and their costs and contact me with your decision.

Please call with any questions regarding this letter or the move in general. Thank you for choosing Warners for your relocation needs. We look forward to providing you with a safe and efficient move

Warmest Regards,

/s/ Joe Allen
Joe Allen
Relocation Consultant

Exhibit C

HOUSEHOLD GOODS BILL OF LADING AND FREIGHT BILL

[LOGO]

M.C. 79658
NOT NEGOTIABLE DOT #125550

GENERAL OFFICES
ATLAS VAN LINES, INC.
1212 ST. GEORGE ROAD, P.O. BOX 509
EVANSVILLE, INDIANA 47703-0509
(800) 252-8885/(812) 424-2222

B/L No. C 64174

REGISTRATION NO.
HH394560

IN CASE OF NEED, CONTACT SHIPMENT INFORMATION MGR AT ABOVE ADDRESS OR TEL. 812-424-2222 REFER TO THIS REG NO.

SHIPPER Richard Lewis
ADDRESS xxx xxx xxx xxx
FLOOR _____ TEL xxx-xxx-xxxx COUNTY _____
CITY Glen Rock STATE/PROV. PA ZIP xxx

CONSIGNEE/OWNER Richard Lewis
ADDRESS xxx xxx xxx xxx
FLOOR _____ TEL xxx-xxx-xxxx COUNTY _____
CITY Alpine STATE/PROV. NY ZIP xxx

CUSTOMS DATA:
PORT OF EXPORTATION _____
VIA _____

RECEIVED SUBJECT TO GENERAL CONDITIONS

1. ALL CHARGES TO BE PAID IN U.S. FUNDS BY CASH, POSTAL MONEY ORDER, CASHIER'S OR APPROVED PERSONAL CHECK PAYABLE TO ATLAS VAN LINES BEFORE PROPERTY IS RELINQUISHED BY CARRIER UNLESS OTHERWISE STATED ON EMPLOYER PAID MOVES, CONSIGNEE IS LIABLE FOR ALL CARRIER CHARGES IF EMPLOYER OR OTHER THIRD PARTY FAILS TO MAKE PAYMENT AS PROMISED.

2. THIS BILL OF LADING IS SUBJECT TO ALL STAMPED OR PRINTED TERMS, INCLUDING THOSE ON THE REVERSE

3. RATES, RULES AND REGULATIONS IN
TARIFF _____
SEC. _____

SHIPPER REQUESTS ☐ REWEIGH NOTIFICATION OF ACTUAL WEIGHT & CHARGES ☐ NO ☐ YES AGREED PICKUP PERIOD _____ AGREED DEL. PERIOD _____

TO _____ TEL. _____
ADDRESS _____

IN CASE OF DELAY NOTIFY _____ TEL. _____
ADDRESS _____

Re Appropriate Tariff Subject to Minimum Weight Of

1000 LBS _____

Or _____

Min. Charges

IMPORTANT

If a review and comparison of items, to be shipped and services rendered reflect that items, services or combinations thereof were added to the shipment after the survey, the carrier reserves the right upon notification to the shipper to void cost of service estimate and/or order for service, review and comparison of items and services by carrier may not be completed on this shipment. Until after loading, if the cost of service estimate and/or order for service are voided by the carrier, transportation charges shall be based on actual weight and actual services rendered payable in full on or before delivery.

Atlas Van Lines, Inc. and the above named shipper agree that Atlas Van Lines, Inc. the carrier, shall transport the goods and effects tendered by the shipper.

Signed Richard J. Lewis 8/26/04
Shipper Date

Carrier Atlas Van Lines, Inc.

Driver _____

Extraordinary (Unusual), Value-Article Declaration. I acknowledge that I have prepared and received a copy of the "Inventory of Items Valued in Excess of $100 Per Pound Per Article" that are included in my shipment and that I have given a copy of this inventory to the carrier's representative. I also acknowledge that the carrier's liability for loss of or damage to any article valued in excess of $100 per pound will be limited to $100 per pound for each pound of such lost or damaged article (based on actual article weight), not to exceed the declared value of the entire shipment, unless I have specifically identified such articles for which a claim for loss or damages is made on the attached inventory.

Shipper _____

Date _____ I decline (_____)

SPECIAL SERVICES ORDERED

☐ Shipment completely occupied a _____ cu. ft. vehicle

☐ Exclusive use of a _____ cu. ft. vehicle ordered

☐ Space reservation _____ cu. ft. ordered

☐ Selected delivery date services ordered by shipper

Deliver on or before: _____

SIGNED X _____

WEIGHT

GROSS

TARE

NET

AUTO WEIGHT

GROSS

TARE

NET

TOTAL SHIPMENT WEIGHT

TRANSPORTATION MILES	B/L RATED BY:	RATE	CHARGE
TOTAL BCS WEIGHT	TOTAL BCS CHARGES		
	Lb. Base Transportation Charge $		
	Lbs. @ _____ CWT $		
Agent	LHD		5013.15
2144	Fuel Surcharge		353.02
2144	Insurance Surcharge		201.73
2144	Add Trans. Orig. 59389 Dest. 291.91		885.80
2144	CONTAINERS PACKING		3012.06
	UNPACKING		
	APPLIANCE SERVICES { ORIGIN DUE / DEST. DUE		
	THIRD PARTY SERVICE		
	PIANO HANDLING		
	ELEVATOR		

AGENT SERVICE DATA

Authorization No.	Agents No
Booked By Warners M&S	2144
Origin Agent Warners M&S	2144
Packed By Warners M&S	2144
Date Loaded At Res.	
By	

Date Loaded At WHSE
By
Hauler 1 Warners 2144
Avl. Trailer # 13327
From Glen Rock PA To Alpine NY
Hauler 2
Avl. Trailer #
From To
Date Delivered

ON ARRIVAL CONTACT

Dest. Agent Mollen Transfer 1453
And
Sit Auth. At
By Per

This bill of lading makes the terms of Carrier's tariffs a part of the contract of carriage between the Carrier and you. These tariffs are available for inspection at Carrier's General Office or Carrier will furnish a copy of the tariffs or any specific tariff, provision upon request. The terms of the tariffs that are incorporated include (I) limits on the Carrier's liability for loss, damage or delay of goods, including fragile or valuable goods; (II) claim restrictions; and (III) rights of the Carrier to impose monetary penalties on shippers for consignees and increase the price of the transportation.

If a separate contract or letter of authorization is in place, the valuation specified; In that contract or letter of authorization shall apply to this shipment.
Customer agrees that title to all packing materials and other property sold to customer passes to customer prior to the transportation of such property by the carrier. The sale price of the containers and container material is $_____. This sale price is included in the total packing service charge.

	FLIGHT NO	
	EXCESSIVE DISTANCE CARRY FEET	
	EXTRA LABOR HRS	
2144	BULKY ARTICLES	55.43
	EXTRA PICKUPS OR DELIVERIES LBS	
	AT	
	VALUATION: ☐ FVP: LUMP SUM $150.000 OR $_____/LB.	922.00
	OPTION A B C FVP WT. _____ ☒ 60/LB/ARTICLE	
	WAREHOUSE HANDLING	
	SIT 1ST DAY WEIGHT	
	FROM TO 2ND & ADD DAYS @	
	CARTAGE TO WHSE. FROM WHSE. CHARGE $_____	
	MI. /CWT $	
	SIT VALUATION	
	SIT VAL _____ 15 DAY PERIOD @ _____ PER PERIOD	
	SITD % OF $	
	BLD % OF $	
	_ CHGE ☐ GBL ☐ PPD ☐ COD ☐ CREDIT CARD TOTAL CHARGES	9551.19
	PREPAYMENT COLLECTED BY R. Markle	10473.19
	ESTIMATED CHARGES $ 110% COLLECTION OPTION (COD) $	(9551.19)
	BALANCE DUE COLLECTED BY /s/ R. Markle	$922.00
	INVOICING CONTRACT/P.O./G.B.L. NO:	(922.00)
	BILL CHARGES TO	0
	STREET	
	CITY, STATE	
	ATTN.	

[Handwritten Notation Illegible]

Paid check # 286724

Bank Name Tompkins Trust Company
PO Box 460
Ithaca, NY 14851

REC'D FOR STORAGE _____
(WAREHOUSE)

BY _____ PER _____
(WAREHOUSEMAN'S SIGNATURE) DATE

DELIVERY ACKNOWLEDGMENT SHIPMENT WAS RECEIVED IN APPARENTLY GOOD CONDITION EXCEPT AS NOTED ON INVENTORY AND SERVICES ORDERED WERE PERFORMED.

/s/ [Illegible] 9/3/04

CONTRACT TERMS AND CONDITIONS

This contract is subject to all the rules, regulations, rates and charges, in carrier's currently effective applicable tariffs including, but not limited to, the following terms and conditions.

SECTION 1. The carrier, or party in possession, shall be liable for physical loss of or damage to any articles from external cause while being carried or held in storage-in-transit EXCEPT loss or damage caused by or resulting:

(a) From an act, omission or order of shipper;

(b) From defect or inherent vice of the article, including susceptibility to damage because of atmospheric conditions such as temperature and humidity or changes therein;

(c) From (1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual impending or expected attack (A) by any government or sovereign power, or by any authority maintaining or using military, naval or air forces; or (B) by military, naval or air forces; or (C) by an agent of any such government, power, authority or forces; (2) any weapon of war employing atomic fission or radioactive force whether in time of peace or war; (3) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating, or defending against such

an occurrence; (4) seizure or destruction under quarantine or customs regulations; (5) confiscation by order of any government or public authority, or (6) risks of contraband or illegal transportation or trade;

(d) (1) For shipments other than household goods as defined in 49 U.S.C. 13102(10) from strikes, lockouts, labor disturbances, riots, civil commotions, or the acts of any person or persons taking part in any such occurrence or disorder;

(2) For shipments of household goods as defined in 49 U.S.C. 13102(10) from delay caused by strikes, lockouts, labor disturbances, riots, civil commotions, or the acts of any person or persons taking part in any such occurrence or disorder, and from loss or damage when carrier, after notice to shipper or consignee of a potential risk of loss or damage to the shipment from such causes, is instructed by the shipper to proceed with such transportation and/or delivery, notwithstanding such risk,

(e) From Acts of God.

SUBJECT, in addition to the foregoing, to the further following limitations on the carrier's or the party's in possession liability:

The carrier's or the party's in possession maximum liability shall be either:

(1) The actual loss or damage not exceeding 60 cents per pound of the weight of any lost or damaged article when the shipper has released the shipment to carrier, in writing, with liability limited to 60 cents per pound per article, or

(2) For a shipment of household goods, as defined in 49 U.S.C. 13102(10), the lump sum value declared by shipper, which may not be less than $10,000 or $4.50 per pound multiplied by the weight of the shipment, in pounds, whichever is greater, subject to any deductible options offered by the carrier and selected by the shipper and to the specific terms and conditions of item 1502 (Full Value Protection) of carrier's published tariff; or

(3) For a shipment of household goods, as defined in 49 U.S.C. 13102(10), when the carrier fails to obtain shipper's value declaration and signature in the valuation statement on the Order of Service, a lump sum equal to $4.50 per pound multiplied by the weight of the shipment, in pounds, subject to the specific terms and conditions of item 1502 (Full Value Protection) of carrier's published tariff.

The weight used for determining the minimum valuation shall be the actual weight or the estimated weight if the shipment is transported pursuant to the terms of item 1501 (Binding Estimate Program) of carrier's published tariff.

SECTION 2. The carrier shall not be liable for delay caused by highway obstruction, or faulty or impassable highways, or lack of capacity of any highway, bridge or ferry, or caused by breakdown or mechanical defect of vehicles or equipment, or from any cause other than negligence of the carrier, nor, shall the carrier be bound to transport by any particular schedule, means, vehicle or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination.

SECTION 3.

(a) The shipper, upon tender of the shipmen to carrier, and the consignee, upon acceptance of delivery of shipment from carrier, shall be liable, jointly and severally, for all unpaid charges payable on account of such shipment in accordance with applicable tariffs including, but not limited to, sums advanced or disbursed by a carrier on account of such shipment. The extension of credit to either shipper or consignee for such unpaid charges shall not thereby discharge the obligation of the other party to pay such charges in the event the party to whom credit has been extended shall fail to pay such charges. All costs of collection, including court costs, reasonable attorney's fees and legal expenses, shall be borne by the party(ies) responsible for payment of the charges.

(b) The shipper shall indemnify carrier against loss or damage caused by inclusion in the shipment of explosives of dangerous articles or goods.

SECTION 4. If for any reason other than the fault of carrier, delivery cannot be made at address shown on the face hereof, or at any changed address of which carrier has been notified, carrier, at its option, may cause articles contained in shipment to be stored in a warehouse selected by it at the point of delivery or at other available points, at the cost of the owner, and subject to a lien for all accrued tariff and other lawful charges.

SECTION 5. If shipment is refused by consignee at destination, or if shipper, consignee or owner of property fails to receive or claim it within 15 days after written notice by United States mail addressed to shipper and consignee at post office addresses shown on the face hereof, or if shipper fails or refuses to pay lawfully applicable charges in accordance with carrier's applicable tariff, carrier may sell the property at its option, either (a) upon the notice and in the manner authorized by law, or (b) at public auction to highest bidder for cash at a public sale to be held at a time and place named by carrier, 30 days notice of which sale shall have been given in writing to shipper and consignee and there shall have been published at least once a week for two consecutive weeks in a newspaper of general circulation at or near

the place of sale, a notice thereof containing a description of the property as described in the bill of lading and the names of the consignor and consignee. The proceeds of any sale shall be applied toward payment of lawful charges applicable to shipment and toward expenses of notice, advertising and sale, and of storing, caring for and maintaining property prior to sale, and the balance, if any, shall be paid to owner of property; PROVIDED that any perishable articles contained in said shipment may be sold at public or private sale without such notices, if, in the opinion of carrier, such action is necessary to prevent deterioration or further deterioration.

SECTION 6. As a condition precedent to recovery, a claim for any loss or damage, injury or delay, must be filed in writing with carrier within nine months after delivery to consignee as shown on face hereof, or in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suit must be instituted against carrier within two years and one day from the date when notice in writing is given by carrier to the claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. Where a claim is not filed or suit is not instituted thereon in accordance with the foregoing provisions, carrier shall not be liable, and such a claim will not be paid.

SECTION 7. When storage-in-transit is effected on a shipment, either at origin or destination, transportation charges between origin and the warehouse where storage-in-transit is effected, and storage charges are due at time of billing, and charges for additional services, advances and other lawful charges shall be due when billed.

SECTION 8. On employer-paid moves, this bill of lading may not constitute the contract of carriage. The terms of any separate agreement between carrier and the employer or other third party shall control, except that Section 3(a) above shall always apply.

SECTION 9. The shipper, consignee or other party responsible for paying the charges on this shipment be liable to Carrier for a service charge equal to one percent of the charges for the shipment (minimum $10.00) for each 30-day period that the charges remain unpaid and for the full amount of any expenses incurred by the Carrier in collecting any amount due on this shipment, including costs and attorney's fees.

FOR CALIFORNIA SHIPMENTS: Shipper agrees with Carrier that title to all packing material passes before any use of the material is made.

Summary of incorporated terms (more complete information available upon request):

(1) In addition to those matters set forth in Section 1 above, Carrier's liability for loss, damage or delay of goods, including fragile or valuable goods, is subject to specific terms in the Carrier's tariff. The principal features of such terms include more complete explanations of the limits on Carrier's liability, give Carrier the option to repair or replace items on which claims are made, offer deductible amounts (for Full Value Protection) and set specific limits on certain items, e.g. automobiles. (2) In addition to those matters set forth in Section 6 above, Carrier's tariff includes restrictions that specify the information that is required to be provided to make a valid claim. (3) The terms of Carrier's tariff also include charges for extension of credit and services that may not be stated on this bill of lading that are actually provided, which may increase the price of the transportation noted on this bill of lading.

Exhibit D

AGREEMENT OF SALE

Form approved by REALTORS® Association of York and Adams Counties, Inc.

BROKER: CBBY Homesale Services — SALES ASSOCIATE: Laurence A. Linot Jr

Acting as: (x) Buyer's Agent ( ) Transaction Licensee

( ) Sub-Agent ( ) Dual Agent

( ) Designated Agent for Buyer with Broker as Dual Agent of Seller and Buyer

IN COOPERATION WITH

BROKER: Jack Gaughen — SALES ASSOCIATE: Ingrid M. Lochte

Acting as: (x) Seller's Agent ( ) Transaction Licensee ( ) Dual Agent

( ) Designated Agent for Buyer with Broker as Dual Agent of Seller and Buyer

App. 99

THIS AGREEMENT is made this 14 day of March, 2005

1. **PARTIES: Between** Lewis
hereinafter called Seller, and Charles E & Constance B. Patterson
(residing at xxx xxx xxx xxx PA xxx Zip ____) hereinafter called Buyer.

2. **PROPERTY:** Seller hereby agrees to sell and convey to Buyer, who hereby agrees to purchase: ALL THAT CERTAIN tract of ground with improvements thereon, if any, known as
xxx xxx xxx xxx
Municipality xxx, County xxx, State PA Zip xxx
Identification: (Tax ID#; Parcel #; Deed Book/Page)

3. **ZONING:** The ZONING CLASSIFICATION of the property is Resid . Failure of this Agreement to contain the zoning classification (except in cases where the property and each parcel thereof, if subdividable, is zoned fully or primarily to permit single family dwellings) shall render this Agreement voidable at the option of the buyer, and, if voided, any deposit tendered by the Buyer shall be returned to the Buyer without any requirement for court action.

4. **PURCHASE PRICE:** The purchase price is $ 280,000 [/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL] (Two Hundred ~~Sixty~~ Eighty [/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL] Thousand — 00/00 Dollars to be paid in cash or equivalent at time of settlement.

5. **DEPOSITS:** Security for the purchase is to be as follows:

   a) Cash/check at signing of this Agreement. $ ____

   b) Cash/check on or before ~~March 20~~ [April 3] , 2005 . $ 1,000.00
   [/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL 3/31/05]

   c) Note/other (specify) ____ $ ____

6. **FINANCING CONTINGENCY:** This sale is contingent upon the following financing for Buyer:

   a) The amount of financing $ 235,700 , is for a term of 15 years. The type of financing 80/10/10 (Fixed/Adjustable/Insured) Interest rate of 0 %; however, Buyer agrees to accept the interest rate as may be committed by the mortgage lender, not to exceed a maximum interest rate of 6 %.

b) The Seller agrees to pay Buyer's closing costs, including prepaid expenses in the maximum amount of 0 .

c) The maximum financing placement, origination, or loan discount fees, or similar charges, to be paid by BUYER shall not exceed 0 % of loan amount.

d) Unless otherwise agreed by Seller, Buyer's financing shall not be contingent upon sale or settlement of any real estate owned by Buyer.

e) Buyer shall make a completed application including payment for appraisal and credit report to a responsible lending institution on or before ~~3-20-05~~ [4-3-05] .
[/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL 3/31/05] Should the Buyer fail to make such completed application within the specified time, it shall be the option of the Seller to declare this Agreement of Sale null and void at which time all deposit monies paid on account shall be forfeited to the Seller as liquidated damages and all copies of this Agreement shall be returned to the Seller's agent for cancellation. Financing terms as stated above cannot be changed without written agreement of all parties.

f) A written mortgage commitment must be obtained by 4-30-05 . If a written commitment is not received by the above date, Buyer and Seller agree to extend the commitment date until Seller terminates this Agreement in writing; and in such event, any deposit shall be returned to Buyer.

7. **ADDITIONAL TERMS AND CONTINGENCIES ARE:**

a) Written acceptance of all parties must be obtained on or before: ~~3-15-05~~ [4-1-05]
[/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL 3/31/05]

b) Settlement is to be made on or before 5-15-05

c) Possession is to be delivered: settlement

d) Payment of transfer taxes will be divided equally between Buyer and Seller.

e) All income and expenses, including but not limited to real estate taxes, rents, water, sewer and refuse charges, condo fees, homeowners' association fees and similar charges, public or private, shall be prorated to date of (settlement/possession) on a fiscal year basis.

f) (see addendum A & B)

8. **FIXTURES, TREES, SHRUBBERY, ETC.:** All plumbing, heating, air conditioning and electrical systems and fixtures and systems appurtenant thereto and forming a part thereof, antennas, masts and rotor systems; screens, storm windows and/or doors, shades, awnings, blinds, drapery and curtain rods and hardware; radiator covers, kitchen cabinets, built-in appliances and wall-to-wall carpet, all trees, shrubbery, and plantings now on property, garage door openers, storage sheds, remaining heating and cooking fuels, excluding propane, stored on the property at time of settlement, all items included in the Seller Disclosure Statement, and dishwasher/washer/dryer/refrigerator/oven/range/shed are INCLUDED in the sale and purchase price. The following items are EXCLUDED from the sale:

None of the above-mentioned included items shall be removed by Seller from premises after the date of this Agreement. Seller hereby warrants that Seller will deliver good title to all the articles described in this paragraph, and any other fixtures or items of personality specifically scheduled to be included in this sale.

9. **DISCLOSURES/INSPECTIONS IF ANY:** Buyer acknowledges receipt of the mandatory Seller Disclosure Statement [/s/ CEP 3/31/05 /s/ CP 3/31/05 /s/ RJL/PAL 3/14/05] (initial) and of the following indicated written disclosures and/or addenda, all of which are made a part of this Agreement.

(x)	Disclosure and Inspection Addendum	( )	Lead-based Paint Brochure
( )	Dual Agency Addendum	( )	Lead-based Paint Testing Contingency
( )	FHA Home Inspection Notice	(x)	Disclosure of Affiliated Business Relationships
( )	VA/FHA Amendatory Clause/ Certification	( )	Addendum for Property Not Connected to Public Sewer
( )		(x)	Addendum A & B

10. **ASSESSMENTS AND NOTICES**: As of the acceptance date of this Agreement, Seller represents the following:

a) No public assessment or notice of a future public assessment for any matter including water, sewer, sidewalk or curbs, has been made against the property.

b) Buyer acknowledges that taxes may increase due to change of assessment or millage rates.

c) No condominium or homeowners' association assessments, if any, remain unpaid.

d) Seller has no knowledge of any notice by any governmental or public authority relating to violations of zoning, housing, building, safety or fire ordinances or codes.

e) Buyer is advised that access to a public road may require issuance of a highway occupancy permit from the Department of Transportation.

f) Sellers of property enrolled in the Clean and Green program shall, as required by law, give the county assessor 30 days notice of the pending sale.

g) Buyer acknowledges that building codes, zoning ordinances, subdivision ordinances and restrictive covenants may control any addition to or modification of the property as well as restrict the use of the property.

If prior to settlement Seller receives any assessments or notices, as previously stated, then Seller shall immediately give notice to Buyers.

Unless otherwise prohibited by law, Buyer will be responsible for any written notice served upon Seller after execution of this Agreement and for the payment thereafter of any public improvement and condominium or homeowners' association assessments.

11. **RIGHT-TO-FARM LAW 3 P.S. SECTION 951-957**: The property you are buying may be located in an area where agricultural operations take place. Pennsylvania protects agricultural resources for the production of food and agricultural products. The law limits circumstances where normal agricultural operations may be subject to nuisance lawsuits or restrictive ordinances.

12. **TITLE AND COSTS**:

    a) The Premises are to be conveyed free and clear of all liens, encumbrances and easements, EXCEPTING HOWEVER: Existing building restrictions, ordinances, easements of roads, easements visible upon the ground, privileges or rights of public service companies, if any; otherwise the title to the above-described real estate shall be good and marketable and such as will be insured by a reputable Title Insurance Company at the regular rates.

    b) If the Seller cannot give a good and marketable title, such as will be insured by a reputable Title Insurance Company at regular rates, then the Buyer has the option of taking such title as the Seller can give without abatement of price or of being repaid all

monies paid by Buyer to Seller on account of the purchase and the Seller will reimburse the Buyer for any costs incurred by the Buyer for inspections specified in paragraph #9 and #12(c) items (1), (2), (3), and in paragraph #12(d); and in the latter event there shall be no further liability or obligation on either of the parties hereto and this Agreement shall become NULL AND VOID and all copies will be returned to Seller's agent for cancellation.

c) The Buyer will pay for the following:

1) The premium for title insurance and/or title search, or fee for cancellation of same, if any.

2) The premiums for flood insurance and/or fire insurance with extended coverage, insurance binder charges or cancellation fee, if any.

3) Appraisal fees and charges paid in advance to mortgagee, if any.

4) Buyer's normal settlement costs.

d) Any survey or surveys which may be required by the Title Insurance Company or the abstracting attorney, for the preparation of an adequate legal description of the premises (or the correction thereof), shall be secured and paid for by the Seller. However, any survey or surveys desired by the Buyer or required by his/her mortgagee shall be secured and paid for by the Buyer.

13. **DOMESTIC RELATIONS LIEN**: Pennsylvania law requires county Domestic Relations Offices to impose property liens for overdue child support. If applicable, Buyer and Seller shall advise their agent/licensee so verification of lien status can be promptly determined.

14. **DEPOSIT AND RECOVERY FUND**: Deposits or hand monies shall be paid to Listing Broker, who shall retain the same until consummation or termination of this Agreement in conformity with all applicable laws and regulations. Listing Broker may hold any uncashed check tendered as deposit pending the acceptance of this other. In the event of dispute for the return of deposit monies, Listing Broker will distribute the monies pursuant to a final order of court or the written agreement of the parties. A real estate recovery fund exists to reimburse persons who have suffered monetary loss and have obtained an uncollectible judgment due to fraud, misrepresentation or deceit in a real estate transaction by a Pennsylvania licensee. For complete details, call 717-783-3658.

15. **TENDER AND POSSESSION**:

    a) Title shall be tendered by way of warranty deed and possession is to be delivered by keys to a vacant building (if any) broom clean, free of debris or by deed and assignment of existing lease(s) at time of settlement if premises are tenant-occupied at the signing of this Agreement, unless otherwise specified herein.

b) Seller will not enter into any new leases, written extension of existing leases, if any, of the premises without expressed written consent of the Buyer.

c) Formal tender of an executed deed and purchase money is hereby waived.

d) Buyer reserves the right to make a pre-settlement inspection of the subject premises.

16. **MAINTENANCE AND RISK OF LOSS**

a) Seller shall maintain the property (including all items mentioned in paragraph #8 herein) and any personal property specifically scheduled herein in its present condition, normal wear and tear excepted.

b) Seller shall bear risk of loss from fire, or other casualties until time of settlement. In the event of damage to any property included in this sale by fire or by other casualties, not repaired or replaced prior to settlement, Buyer should have the option of rescinding this Agreement and receiving all monies paid on account or of accepting the property in its then condition together with the proceeds of any insurance recovery obtainable by Seller. Buyer is hereby notified that he may insure his equitable interest in this property as of the time of the acceptance of this Agreement.

c) Buyer agrees, if necessary, to apply to not less than three insurance companies in order to secure basic Homeowners insurance coverage.

17. **RECORDING**: This Agreement shall not be recorded in the Office for the Recording of Deeds or in any other office or place of public record.

18. **ASSIGNMENT**: This Agreement shall be binding upon the parties, their respective heirs, personal representatives, guardians and successors, and to the extent assignable, on the assigns of the parties hereto, it being expressly understood, however, that the Buyer shall not transfer or assign this Agreement without the written consent of the Seller.

19. **DEFAULT**: Time shall be of the essence with respect to performance of any obligation arising under this Agreement. Compliance therefore must be made by the specified date(s) or Seller may, at Seller's sole election, hold Buyer in breach of this agreement. Should the Buyer: 1) fail to make any additional payments, as specified in paragraph #5, or 2) furnish false or incomplete information to the Seller, Seller's Agent or the mortgage lender concerning the Buyers legal or financial status, or fail to cooperate in the processing of the mortgage loan application, which acts would result in the failure to obtain the approval of mortgage loan commitment, or 3) violate or fail to fulfill and perform any of the terms or conditions of this Agreement. The Seller may, at Seller's option, elect:

    a) to declare the agreement of sale null and void; and

    b) to proceed against the buyer for Seller's actual damages; or

c) to retain all deposit money paid on account as liquidated damages which amount the parties agree is a reasonable sum and not in the nature of a penalty.

Should the Seller violate or fail to fulfill and perform any of the terms and conditions of this Agreement, Buyer may elect:

a) to pursue Buyer's remedy for specific performance of the Agreement or

b) proceed against the Seller for Buyer's actual damages; or

c) receive a return of the deposit money and also be entitled to receive an additional sum equal to the deposit money paid on the account as liquidated damages which amount the parties agree is a reasonable sum and not in the nature of a penalty.

20. **REPRESENTATIONS**: Seller represents that Seller has informed Buyer of any hidden or latent defects of which Seller has knowledge. It is understood that the Buyer has inspected the property and any personal property to be included in the sale or hereby waives the right to do so and has agreed to purchase it as a result of such inspection and not because of or in reliance upon any representations which were not included in this agreement whether made by any broker, transaction licensee or any of their respective sales people, employees, officers and/or partners.

Buyer agrees that any and all statements, claims, advertisements, marketing, promotional exhibits, building and subdivision plans made

or presented by Seller, brokers, their licensees, employees, officers, or partners are not incorporated in this agreement of sale unless expressly so stated to be made a part thereof. The Buyer has agreed to purchase the property in its present condition unless otherwise specified herein. It is further understood that this Agreement contains the whole Agreement between the Seller and the Buyer and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever concerning this sale. Furthermore, this Agreement shall not be altered, amended, changed or modified except in writing executed by the parties.

21. **RELEASE**: Buyer hereby releases, quit-claims and forever discharges all real estate licensees, employees and any officer or partner of any one of them and any other person, firm or corporation who may be liable by or through them from any and all claims, losses or demands, in law or equity, including but not limited to personal injuries, property damage and any and all of the consequences thereof, whether now known or not, which may arise from the presence of mold, all wood-boring insects, radon, lead-based paint hazards, environmental hazards, any defects or deficiencies in the onlot sewage disposal system and/or on-site water service system, or any defects or conditions on the property. This release shall survive settlement.

22. **MEDIATION**: The Buyers, Sellers and Brokers agree that disputes relating to this Agreement SHALL be submitted to mediation in accordance

with the rules and procedures of the dispute resolution system established by the REALTORS® Association of York and Adams Counties, Inc., and that if any agreement is reached by the Buyers, Sellers and Brokers pursuant to a mediation conference, it shall be binding upon them. Costs of mediation to be shared equally by Buyers, Sellers and Brokers named in the dispute. This duty to mediate disputes shall survive final settlement.

23. **EXECUTION**: This Agreement and any amendments thereto, maybe executed by the parties by way of transmission through a Facsimile (FAX) machine; such a copy shall have the same legal enforceability and binding effect upon the parties as though it were signed by all parties in original form.

APPROVAL BY BUYER: The Buyers hereto, intending to be legally bound hereby, have hereunder set their hands and seals the day and year first above written.

WITNESS
/s/ [Illegible]

BUYER
/s/ Charles E. Patterson (SEAL)

WITNESS
/s/ [Illegible]

BUYER
/s/ Constance B. Patterson (SEAL)

WITNESS

_____

BUYER

_____ (SEAL)

APPROVAL BY SELLER: Seller hereby accepts/ counteroffers the above proposal this 1st day of April, 2005.

The effective date of this Agreement shall be the date on which the offer or any counteroffer is accepted as evidenced by the dated signature or dated initials.

WITNESS
/s/ [Illegible]

SELLER
/s/ Richard J. Lewis
(SEAL)

WITNESS

SELLER
/s/ Patricia A. Lewis
(SEAL)

WITNESS

SELLER

(SEAL)

DISCLOSURES AND INSPECTION ADDENDUM

Form approved by REALTORS® Association of York and Adams Counties, Inc.

DATE 3-14-05

RE: PROPERTY xxx

SELLER: Lewis

BUYER: Charles E & Constance B. Patterson

It is understood and agreed that the above Agreement of Sale shall be endorsed as follows:

Seller and Buyer include the initialed paragraph(s) as supplemented by the applicable provisions on **THE REVERSE SIDE OF THIS DOCUMENT**, as part of the above-captioned Agreement.

IN THE EVENT THE INSPECTIONS, TESTS AND/OR CERTIFICATIONS, INCLUDING WRITTEN RESULTS FURNISHED TO SELLER, ARE NOT COMPLETED WITHIN THE PRESCRIBED TIME PERIOD STATED BELOW, THEN ALL PARTIES ACKNOWLEDGE THAT BUYER'S RIGHT TO CONDUCT SAID INSPECTIONS SHALL BE WAIVED UNLESS PRESCRIBED BY THE MORTGAGE LENDER, from whom buyer is securing a loan, in accordance with the mortgage contingency clause in the above-captioned Agreement.

____ / ____ Seller ____ / ____ Buyer **1. Condominium or Planned Community**
Public offering statement or resale certificate and related documents as applicable for condominium or Planned Community to be received on/or before _____
These documents cannot be waived.

____ / ____ Seller CEP / CP Buyer **2. Wood Destroying Pest Inspection** Completed on/or before ~~4-17-05~~
(15 days after ratified contract
[/s/ PAL/RJL CEP/CP 3/31/05]

____ / ____ Seller CEP / CP Buyer **3. On-Lot Waste Water Treatment System Inspection** Completed on/or before ~~4-17-05~~
(15 days after ratified contract
[/s/PAL/RJL CP/CEP 3/31/05]

____ / ____ Seller CEP / CP Buyer **4. Water Test:**
__ Coliform Bacteria (Potability)
✓ FHA/VA
__ Other: _____
Completed on/or before _____

____ / ____ CEP / CP **5. Other Inspection(s):**
Seller Buyer

____ Air Conditioning — Completed on/or before ____
____ Roof/Flashing — Completed on/or before ____
____ Plumbing — Completed on/or before ____
____ Heating — Completed on/or before ____
____ Electrical — Completed on/or before ____
____ Structural — Completed on/or before ____
____ EIFS (synthetic stucco) — Completed on/or before ____
__✓__ Other: Check Motor Radon System — Completed on/or before 4-17-05
(15 days after ratified contract)
[/s/ RJL/PAL CP/CEP 3/31/05]

____ / ____ CEP / CP **6. Whole House Inspection** — Completed on/or before 15 days after ratified contract
Seller Buyer
[/s/ CP/CEP PAL/RJL 3/31/05]

If Buyer elects to have a whole house inspection, unless specifically agreed by Buyer and Seller to the contrary, such inspection shall be performed in accordance with all of the provisions of the Pennsylvania Home Inspection Law. (See Pennsylvania Home Inspection Law notice on Reverse)

____ / ____ ____ / ____ **7. Radon Test** — Completed on/or before ____
Seller Buyer

____ / ____ ____ / ____ **8. Mold Inspection/Test** — Completed on/or before ____
Seller Buyer

WAIVER OF INSPECTIONS: Unless otherwise requested in paragraphs 1 through 8 by Buyer, or unless required by Buyer's mortgage lender, Buyer hereby acknowledges and agrees that Buyer unconditionally waives any and all rights to any pre-settlement tests, inspections or certifications concerning the condition of the subject property whatsoever. This waiver applies regardless of whether Buyer has acquired equitable interest in the property under the provisions of this Agreement of Sale.

All the inspections or re-inspections called for above are the Buyer's responsibility, and shall be Buyer's expense, unless otherwise prescribed by law or government regulation. Buyer agrees to pay for any indicated inspections whether or not settlement occurs. Provided, however, the cost of the On-Lot Waste Water Treatment System Inspections shall be allocated between the Buyers and Sellers as follows: Locating, Uncovering & Recovering Septic to be paid by _____, Pumping Septic to be paid by _____, Inspection to be paid by _____.

Upon the execution of this agreement, authority is hereby given to Buyers to select said inspection companies.

Buyer hereby states that he/she understands that he/she is not obligated to use any individual firm recommended or suggested by any Broker/salesperson involved in this transaction. However, if authority has been given such Broker/salesperson to order any

tests or inspections, as evidenced by the preceding paragraph, Buyer hereby releases Broker/salesperson from any claim arising out of their selection of any individual or firm.

Seller is hereby notified that all utilities must be connected and operational for a whole house inspection or specific component inspection and it is Seller's responsibility to have utilities on and available for inspector. Should utilities not be connected and re-inspection is required, cost shall be paid by Seller.

All other terms and conditions of the said Agreement shall remain unchanged and in full force and effect.

DEFINITIONS AND NOTICES

1. **CONDOMINIUM OR PLANNED COMMUNITY**:

   A prospective Buyer of a condominium unit or a property within a Uniform Planned Community has the option of canceling the Agreement of Sale with the return of all deposit monies, until a resale certificate has been provided to the prospective Buyer and for 5 days thereafter or until conveyance of the property, whichever first occurs.

2. **WOOD DESTROYING PEST INSPECTION**:

   A wood destroying pest infestation and damage report from a licensed exterminator. Such certification is to provide that an inspection of the readily accessible areas of the existing building(s) and other vulnerable improvements on the subject property has been made satisfactory to and

in compliance with all applicable laws and the requirements of any mortgage or lending institution or any agency providing federal insurance or guarantees. Seller may receive notice from the exterminator that there exists either active infestation(s) or evidence of previous infestation(s) and/or resultant damage, which has not been corrected.

3. **ON-LOT WASTE WATER TREATMENT SYSTEM INSPECTION**:

A written report from a qualified inspector that the sewage system is functioning properly. A proper test may include locating and uncovering septic system, pumping of tank and inspection of components existing in system. Vacant property may require additional testing which may include a hydraulic load test.

(NOTICE: Some municipalities may require outdated and malfunctioning on-lot systems to be replaced.)

4. **WATER TEST**:

Water test(s) from a certified laboratory according to standards established by the Environmental Protection Agency (EPA).

5. **OTHER INSPECTIONS**:

Written report(s) from qualified inspector(s) that at the time of inspection the indicated system(s) are in good working order and structurally sound (if structural inspection requested). With regard to plumbing, heating, roofing and flashing, age and normal wear and tear are not deficiencies.

Exterior Insulation and Finish Systems (synthetic stucco) are multi-layer materials applied to the exterior of some buildings. Improper installation of synthetic stucco may result in moisture penetrating the surface of the walls which may cause damage to the building.

6. **WHOLE HOUSE INSPECTION**: (68 Pa. C.S.A. §7501, et. seq., effective December 20, 2001)

   a) The Home Inspection Law applies to residential real estate transfers of not less than one and not more than four residential dwelling units.

   b) A home inspection under this law is a noninvasive, visual inspection of some combination of the mechanical, electrical or plumbing systems or the structural and essential components of a residential dwelling designed to identify material defects in those systems and components.

   c) A home inspection under this law does not include an examination of a single system or component of a residential dwelling such as electrical or plumbing systems or its roof. It also does not include inspections that are limited to one or more of the following: wood destroying insects, wells, septic systems, air and air quality, and environmental hazards.

   d) A material defect, if identified by a home inspection, is any problem with the property or any portion of it that would have a significant adverse impact on the value of the property or that involves unreasonable risk

to people on the property. The law further states that a structural element or system that is near or beyond the end of its normal useful life is not by itself a material defect.

e) A material defect, therefore, does not generally include maintenance and cosmetic items unless they meet the definition above stated.

f) A home inspector is defined to be an individual who performs home inspections and is a member of a national home inspection association. The law requires that home inspectors provide customers with verifications that they are a member of such an organization.

7. **RADON TEST**:

A radon test from a qualified testing service indicating that radon gas, if present, is within limits deemed acceptable by the United States Environmental Protection Agency (EPA).

NOTICE TO SELLER/BUYER REGARDING RADON GAS:

a) Radon is a radioactive gas produced naturally in the ground by a normal decay of uranium and radium. Uranium and radium are widely distributed in trace amounts in the earth's crust. Descendants of radon gas are called radon daughters or radon progeny. Several radon daughters emit alpha radiation, which has high energy but short range.

b) Studies indicate the result of extended exposure to high levels of radon gas/radon daughters is an increased risk of lung cancer.

c) Radon gas originates in soil and rocks. It diffuses, as does any gas, and flows along the path of least resistance to the surface of the ground, and then to the atmosphere. Being a gas, radon can also move into any air space, such as basements or crawl spaces, and permeate throughout the home.

d) If a house has a radon problem, it can usually be cured by (a) increased ventilation, and/or (b) preventing radon entry.

e) The EPA advises corrective action if the ANNUAL average exposure to radon is at or above 4pCl/L. Further information can be secured from the DEP, Bureau of Radiation Protection, PO Box 8469, Harrisburg PA 17105-8469, 1-800-23RADON or (717) 783-3594.

8. **MOLD INSPECTION/TEST:**

Buyer is hereby advised that mold and/or other microscopic organisms (commonly referred to as "Mold") may exist in, on or around the Property and such Mold may have the potential to cause health effects including, but not limited to, physical injuries, allergic and/or respiratory reactions or other problems, particularly in persons with immune system problems, young children and/or elderly persons.

Real estate Brokers/salespersons are not qualified to inspect property for mold or make recommendations or determinations concerning possible treatment of mold or its health or safety issues. The purpose of this disclosure is to put buyers on notice to conduct their own inspection/test regarding this matter, prior to closing, using appropriate, qualified experts.

SELLER, LISTING AGENT AND SELLING AGENT SHALL HAVE THE RIGHT TO A COPY OF ANY OF THE ABOVE REPORTS.

IMPORTANT NOTICE

IF ANY OF THE ABOVE REPORTS INDICATES A SUBSTANTIAL DEFECT EXISTS,* BUYER SHALL HAVE SEVEN (7) CALENDAR DAYS TO GIVE SELLER WRITTEN REPORT AND WRITTEN NOTIFICATION OF THESE CONDITIONS. If Buyer does not provide the Seller with said written report and written notification of defects within this 7 calendar day period then the Buyer waives the right to any indicated repairs. (***SUBSTANTIAL DEFECT: A single, non-cosmetic defect for which correction will exceed a cost of $300.00; or any defect which may adversely affect the health or safety of the occupants. The $300.00 value cited is non-cumulative and is not based on an accumulation of defects. If any discovered defect is not substantial as defined herein, Buyer agrees that Buyer shall have no right to**

demand correction of such defect and no right to void or cancel this Agreement.

UPON RECEIPT BY SELLER OF NOTIFICATION FROM BUYER OR LENDER THAT SUBSTANTIAL DEFECTS EXIST WHICH MUST BE CORRECTED PRIOR TO FINAL SETTLEMENT, IN THAT EVENT, Seller shall have the right, unless prohibited by law or governmental regulation, to cure such substantial defect, and shall within seven (7) calendar days of such notice, advise Buyer, in writing, whether or not the substantial defect shall be so corrected. If Seller agrees to pay for the correction of all such substantial defect this agreement shall remain in force and effect and shall survive final settlement. In such event, Buyer shall have NO right to void or cancel this agreement because of any such substantial defect.

If Seller does not respond or elects not to correct the substantial defect, the Buyer shall then have the option of (a) accepting the property with the substantial defect as revealed by any inspection without abatement of price, or (b) of being refunded all earnest monies paid thus far by Buyer toward the purchase price. In the event the second option is exercised, there shall be no further liability or obligation of either Buyer or Seller, and this Agreement shall become NULL and VOID. However, in order to invoke this contingency, Buyer shall notify Seller, in writing, of his election within seven (7) calendar days after Buyer receives Seller's decision not to correct the substantial defect; otherwise, Buyer waives his/her right to exercise this option, and this agreement shall remain in full force and effect.

All other terms and conditions of the said Agreement shall remain unchanged and in full force and effect.

WITNESS	BUYER
_____	/s/ Charles E. Patterson
WITNESS	BUYER
/s/ [Illegible]	/s/ Constance B. Patterson
WITNESS	BUYER
_____	_____
WITNESS	SELLER
/s/ _____	/s/ Richard J. Lewis
WITNESS	SELLER
/s/ [Illegible]	/s/ Patricia A. Lewis
WITNESS	SELLER
_____	_____

DOUGLAS H. GENT
ATTORNEY & COUNSELOR AT LAW

Wills & Trusts • Estate Administration •
Business/Corporate • Real Estate • Litigation •
Elder Law • Title Insuranc

[Address And Phone Numbers Omitted In Printing]

Douglas H. Gent, Esq.
dgent@gentlaw.com

Eric R. Dutcher, Esq.
edutcher@gentlaw.com

October 26, 2004

Mr. Jeffrey Warner
Warners Moving & Storage
PO Box 269
West Country Club Road
Red Lion, PA 17356

RE: Richard J. and Patricia A. Lewis

Dear Sir:

Mr. and Mrs. Lewis have retained this office to represent them with respect to losses they have incurred arising out of your negligence in performing your contractual obligations to move Mr. and Mrs. Lewis' belongings on August 27, 2004, to their new home in New York. As a result of your failure to perform your contractual obligation, Mr. and Mrs. Lewis were unable to meet the terms of the sale of their house, closing of which was scheduled at 4:00 p.m. on August 27, 2004. Since they were not able to close, they lost that sale and have not been able to resell their house.

Mr. and Mrs. Lewis' losses include, but are not limited to, loss of profit on the sale of their residence, additional mortgage payments that Mr. and Mrs. Lewis have had to pay on two mortgages on their Pennsylvania residence which otherwise would have been paid off at closing, and various other miscellaneous expenses they would not have otherwise incurred.

Needless to say, this entire situation has been very emotionally distressful for Mr. and Mrs. Lewis particularly since their move to New York State is a part of Mr. Lewis retiring and having reduced financial obligations.

The primary purpose of this letter is to notify you of our representation of Mr. and Mrs. Lewis' claim, and to request that you immediately notify your insurance carrier in the event your insurance carrier would provide coverage for this type of claim. I anticipate being in touch with you within the next 30 to 60 days with the exact amounts of their claim; however, until they are actually able to sell their Pennsylvania residence, it will be difficult to provide an exact number.

Please do not hesitate to contact this office if you have any questions.

Sincerely,

/s/ Douglas H. Gent, [illegible]
Douglas H. Gent

DHG/rec

Cc: Atlas Van Lines, Inc.
PO Box 509
1212 St. George Road
Evansville, IN 47703-0509

[LOGO]
BLAKEY, YOST, BUPP & RAUSCH, LLP
Attorneys at Law

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John J. Baranski, Jr.
Michael C. Anderson,
Wanda L. Snader

of counsel

Donald H. Yost

[Address And Phone Numbers Omitted In Printing]

November 4, 2004

Douglas H. Gent, Esquire
1157 Eichelberger Street
Suite 4
Hanover, PA 17331

Re: Richard J. and Patrica A. Lewis v. Warners Moving & Storage

Dear Doug:

Please be advised that this office represents Warners Moving & Storage. Reference is made to your letter of October 26, 2004. In response to your letter, there is no insurance for this claim. In order to evaluate the circumstances, I would appreciate your providing me more details about this transaction. Please send me a copy of the Sales Agreement between your clients and the purchasers, any letters of counsel or other documentation, including letters

about the cancellation of the settlement, realtors' letters, etc. Upon receipt of everything, we will see if we are in a position to respond to your letter.

Thank you.

Very truly yours,

/s/ Donald B. Hoyt
Donald B. Hoyt
BLAKEY, YOST,
BUPP & RAUSCH, LLP

DBH/isk

cc. Mr. Jeffrey Warner

THE LAW OFFICES OF DOUGLAS H. GENT
ATTORNEYS & COUNSELORS AT LAW

Wills & Trusts • Estate Administration •
Business/Corporate • Real Estate • Litigation •
Elder Law • Title Insurance

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November 9, 2005

Attorney Donald B. Hoyt
Blakey, Yost,
Bupp & Rausch, LLP
17 East Market Street
York, PA 17401

Atlas Van Lines, Inc.
ATTN: Claims Department
P.O. Box 509
1212 St. George Road
Evansville, IN 47703-0509

RE: Richard J. & Patricia A. Lewis v. Warner's Moving & Storage

Dear Attorney Hoyt and To Whom it May Concern at Atlas Van Lines, Inc:

This is a follow up to Attorney Hoyt's letter of November 4, 2004, on the above-captioned matter. Our response has been delayed because we have been waiting for Mr. & Mrs. Lewis to re-sell their former residence located at xxx xxx xxx xxx, Glen Rock, Pennsylvania, and to gather other information with respect to their damages. The purpose of this letter is to outline in detail Mr. & Mrs. Lewis's claim against Warner's Moving & Storage.

The first thing I want to bring to your attention is that it appears that at the time of this incident

Warner's Moving & Storage was an agent for Atlas Van Lines, Inc. I have enclosed a copy of the estimate prepared for the cost of moving along with a copy of a brochure that was provided to Mr. & Mrs. Lewis by Warners. In the event a lawsuit would be commenced, we would include not only Warner's Moving & Storage as a defendant but also Atlas Van Lines, Inc.

Mr. & Mrs. Lewis entered into a contract on July 19, 2004, for the sale of their residence to Bruce D. & Crystal L. Gibbons in the amount of $315,000.00. Settlement was to occur on or before August 27, 2004. A copy of the Agreement of Sale is enclosed herewith. Mr. & Mrs. Gibbons obtained their financing commitment, all required inspections and other matters were completed, and settlement was scheduled for 4:00 p.m. on August 27, 2004. In late July, 2004, Mr. & Mrs. Lewis entered into a contract with Warner's Moving & Storage to have their household effects moved to their new residence that was being built at xxx xxx xxx, Alpine, New York. Enclosed is a copy of a letter executed by Joe Allen, relocation consultant for Warner's Moving & Storage confirming the terms of the contract. Please note that the letter identifies Warners as an interstate agent for Atlas.

This letter confirms the terms agreed upon as far as the dates and times for completing the move. The letter confirms that representatives of Warners would appear at my clients residence on August 23 and 24 to box up household belongings and that the loading of my clients possessions into a moving truck(s) would occur on August 25 and August 26. Delivery at my

client's new residence in New York was scheduled for August 31 or September 1.

My client indicates that packers appeared on August 23 and 24 to box up household belongings. A moving van appeared at my client's residence on August 25, 2004, at approximately 12:00 noon and stayed only until 5:00 p.m. At that time your client advised Mr. Lewis that the moving van would be taken back to your client's place of business because the tractor and the crew were needed to handle a move to North Carolina beginning the next day. Your client failed to appear on August 26 to continue to perform its contractual obligations with Mr. and Mrs. Lewis. During the day Mr. Lewis attempted to contact your client and apparently spoke with an individual named Joe Kilgore who did not provide any satisfactory response.

No one appeared on August 27, 2004 to load the van with Mr. & Mrs. Lewis's household effects. Mr. Lewis again contacted your client and spoke with Jeff Warner at approximately 12:00 noon. Mr. Warner advised my client that he had no licensed driver available to load up Mr. & Mrs. Lewis's household effects.

When my clients, Mr. & Mrs. Gibbons and the real estate agents met at approximately 4:00 p.m. on August 27, 2004, to discuss the situation and to close, Mr. and Mrs. Lewis contacted Mr. Kilgore who promised that your client would have all of Mr. and Mrs. Lewis' belongings packed and moved out of the house by 1:00 p.m. on Saturday. Unfortunately, this was

unacceptable to the buyers. At that point Mr. & Mrs. Gibbons terminated the transaction and left settlement.

Apparently representatives of Warners showed up at Mr. & Mrs. Lewis's residence at 9:00 a.m. on August 28, 2004, and worked until approximately 9:00 p.m., at which time they advised Mr. & Mrs. Lewis that a second truck would be needed. Your client provided a second truck on Sunday, August 29, 2004, and completed loading Mr. & Mrs. Lewis' household effects sometime on that date. Unfortunately, the sale had been lost.

Mr. & Mrs. Lewis immediately put their house on the market using the same real estate agent. On March 14, 2005, Mr. & Mrs. Lewis entered into a subsequent contract with a Charles E. & Constance E. Patterson for the sale of my client's residence for the sum of $280,000.00. Settlement was to occur on or before May 18, 2005. Settlement was subsequently extended to June 3, 2005. A copy of that contract is enclosed along with a copy of the settlement statement evidencing the completion of the sale.

It is clear that your client breached its contractual obligations with my clients by failing to provide a truck and personnel to load the truck on August 25 and August 26, 2004, so that my clients could vacate the premises in a timely fashion pursuant to the terms of their agreement of sale with Mr. & Mrs. Gibbons. My clients paid your client $10,477.00 for the move. All of the essential facts are easily verifiable. We would be presenting as witnesses, in

addition to my clients, the real estate agents involved are Ingrid Locte and Mary Anne Panicho. Further, I would anticipate that your client's required logs and other business records will verify the above facts.

As a result of your client's breach of its contractual obligations, my clients have incurred damages in the amount of $72,462.96. Their damages consist of the following:

1	Loss in sale price	$35,000.00
2	Additional interest paid on their first mortgage with GMAC	$7,772.39
3	Additional interest paid on their home equity line of credit	$1,070.78
4	Additional electric utility bills	$435.00
5	Telephone bills	$249.20
6	ADT security system charges	$206.55
7	Additional home-owners insurance premium	$339.03
8	Additional gas utility	$371.70
9	Additional county and borough real estate taxes	$570.69
10	Additional school tax	$2,549.97
11	Federal income taxes paid on withdrawal from 401(k) plan	$19,328.27
12	New York income taxes paid	$5,825.93
13	Credit for savings on reduced real estate commission & realty transfer tax	($1,050.00)
14	Total Loss	$72,462.96

With respect to the income taxes paid on the withdrawal from Mr. Lewis's 401(k) identified above, because of the loss of this sale on August 27, 2004, Mr. & Mrs. Lewis did not have the net proceeds available to pay off their construction mortgage for their house in New York. As a result, Mr. Lewis had to withdraw $87,946.48 from his 401(k) retirement plan through his place of employment. Enclosed is a copy of the withdrawal confirmation statement for Mr. Lewis's withdrawal from his 401(k). My client has his bills and checks to verify all of the other expenses set forth above. Enclosed is a copy of a spreadsheet prepared by Mr. Lewis setting forth those expenditures on a monthly basis.

A copy of this letter is being sent to the claims department for Atlas Van Lines, Inc. to put them on notice of the claim.

At this time, my clients are seeking payment of $72,462.96 to settle their claim against your client and Atlas Van Lines, Inc. This offer of settlement will be open for 30 days from the date of this letter after which it will be withdrawn. If no response is received or this matter is not resolved to the satisfaction of my clients within said time limit, Mr. & Mrs. Lewis have

authorized me to proceed with the filing of a lawsuit against both your client and Atlas Van Lines, Inc.

Sincerely,

/s/ Douglas H. Gent [illegible]
Douglas H. Gent

DHG/abk

Enclosures

EXPENSES INCURRED DUE TO LOSS OF SALE ON xxx xxx xxx xxx

Month	Sep-04	Oct-04	Nov-04	Dec-04	Jan-05	Feb-05	Mar-05	Apr-05	May-05	Total
PAYEE										
GMAC Mortgage (Interest)	$871.42	$869.47	$867.62	$865.65	$863.66	$861.67	$859.66	$857.64	$855.60	$7,772.39
Home Equity Line (Interest)	$77.02	$78.45	$85.89	$86.15	$86.15	$130.31	$137.20	$156.19	$233.42	$1,070.78
Electric Bill	$130.00	$36.00	$33.00	$31.00	$40.00	$38.00	$42.00	$63.00	$22.00	$435.00
Telephone Bill	$70.48	$22.34	$22.34	$22.34	$22.34	$22.34	$22.34	$22.34	$22.34	$249.20
										~~$339.03~~
ADT Security	$22.95	$22.95	$22.95	$22.95	$22.95	$22.95	$22.95	$22.95	$22.95	[206.55]
Home Insurance	$37.67	$37.67	$37.67	$37.67	$37.67	$37.67	$37.67	$37.67	$37.67	$339.03
Gas (Heat)					$371.70					$371.70
Real Estate Tax	$63.41	$63.41	$63.41	$63.41	$63.41	$63.41	$63.41	$63.41	$63.41	$570.69
School Tax	$283.33	$283.33	$283.33	$283.33	$283.33	$253.33	$283.33	$283.33	$283.33	$2,549.97
										~~$13,585.31~~
Total	$1,556.28	$1,413.62	$1,416.21	$1,412.50	$1,791.21	$1,459.68	$1,468.56	$1,506.53	$1,540.72	[$13,358.76]